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NO. 73-799

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al.,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
The Constitution of the United States of America	3
Article I, Section 8	3
Amendment V	3
Internal Revenue Code of 1954: Section 269	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
Preliminary Statement	7
Deprivation of Property Without Due Process	12
Conflict Among the Circuits	16
CONCLUSION	22
CERTIFICATE OF SERVICE	24
APPENDIX	27

LIST OF AUTHORITIES

CASES

	Page
Dixon v. United States, 381 U.S. 68, 85 S.Ct. 1301, 14 L.Ed. 2d 223 (1965)	15
Farmers' and Merchants' Bank v. United States, 476 F.2d 406 (4th Cir. 1973)	13, 14, 15, 17, 18, 19
International Business Machines Corporation v. United States, 343 F.2d 914 (Ct. Cls., 1965)	14, 15, 17
Knowlton v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.E. 969 (1900)	14
Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.E.2d 493 (1957)	6

CASES

Page

Sirbo Holdings, Inc. v. C.I.R., 476 F.2d 981 (2d Cir. 1973) 14, 15, 16, 19, 20, 21
Tidewater Hulls, Inc. v. United States, 68-1 USTC ¶9405 (U.S. Dist. Ct., E.D.La., 1968) .....Cited throughout brief
United States v. Kaiser, 363 U.S. 299, 80 S.Ct. 1204, 4 L.E. 2d 1233 (1960) 15

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States of America:

Article I, Section 8 3
Amendment V 3

Internal Revenue Code of 1954: Section 269 3

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Bay Sound Transportation Co., et al., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered herein on June 28, 1973.

OPINIONS BELOW

The first opinion herein by the U. S. District Court for the Southern District of Texas, Houston Division, rendered August 30, 1967, is not officially reported. It is unofficially reported at 67-2 USTC ¶ 9641. (R. 1537-1614.)

The first opinion of the U. S. Court of Appeals for the Fifth Circuit was entered on April 30, 1969. It is reported at 410 F.2d 505, following which this Court denied our petition for certiorari, 396 U.S. 928 (1969), 396 U.S. 1031 (1970).[1] The issues resolved in that decision are not involved in this application for certiorari.

The second opinion rendered by the U. S. District Court, to which the case was remanded on the corporate surtax-exemptions issue, after a November 16, 1970 hearing, was entered on May 26, 1972, 350 F. Supp. 420.

The second opinion of the Court of Appeals, rendered by a different panel on our second appeal, was entered April 12, 1973. 474 F.2d 1397 (1973). A petition for rehearing was denied by the Fifth Circuit June 28, 1973. It is from this decision that petitioners now seek relief.

All of the decisions referred to above are set out in a separate addendum.

JURISDICTION

The United States District Court had jurisdiction of this case under 28 U.S.C. §§ 1340 and 1346(a)(1).

The United States Court of Appeals for the Fifth Circuit had jurisdiction of this case under 28 U.S.C. § 1291.

The final judgment of the Court of Appeals on our second appeal was rendered April 12, 1973, and its decision overruling our petition for rehearing was entered on June 28, 1973.

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1. Inasmuch as the Fifth Circuit had granted us a reversal and remanded the case on the separate corporations issue which is now before this Court, our previous petition for certiorari was limited primarily to the depreciation issue.

On September 10, 1973, petitioners filed in this Court an application for extension of time for filing this petition for certiorari. On September 13, 1973, the Honorable William H. Rehnquist, Associate Justice, ordered that the time for filing a petition for writ of certiorari be extended to and including November 23, 1973. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the intentionally discriminatory application of a federal tax is invalid under the Constitution or laws of the United States; i.e., whether the government is constitutionally or legally barred from deliberately acquiescing and relieving one taxpayer from payment of a tax while enforcing payment thereof from another whose situation is expressly recognized by the government as being identical.

(2) Whether there is a necessity for resolving the conflict existing between the United States Circuit Courts of Appeals on the above issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable Constitutional provisions (namely, Section 8 of Article I and particularly the Fifth Amendment) and the applicable statute (Section 269 of the Internal Revenue Code) are set out in the Appendix, *infra*.

STATEMENT OF THE CASE

In order to set forth meaningfully the facts of the instant case (*Bay Sound*), it is necessary to also set forth the exactly parallel developments in the case of *Tidewater*

Hulls, Inc. v. United States (E.D., La., decided April 8, 1968), 68-1 USTC ¶ 9405 (*Tidewater*).

Bay Sound involves the Edwards fleet of vessels. According to the district court, C. W. Edwards, the ultimate decision maker, let the contracts for the construction of the twenty vessels, and, as the vessels were completed, individual corporations took title to each. The vessels were then placed in service with the Edwards fleet.

Tidewater involved the LaBorde fleet of vessels. The LaBorde group of investors formed Tidewater Marine Service, Inc., as the parent corporation. As each new vessel was acquired or constructed, a new corporation was formed to take title to it. All stock of the newly formed corporation was then transferred to Tidewater Marine Services, Inc. At the end of the last taxable year involved in its litigation, Tidewater Marine Service, Inc. had twenty wholly-owned subsidiaries, fourteen being involved in the litigation. The parent corporation managed all of the affairs of the subsidiaries as their agent.

Both the Edwards fleet and the LaBorde fleet took the position that they were entitled to a separate surtax exemption for each individual corporation. This position was contested by the government in each case. Two parallel lines of litigation resulted and went forward simultaneously. Although other issues were involved in this case, this present application for certiorari applies only to the one common, identical, issue of the two cases. The corporate structures in *Bay Sound* and *Tidewater* are indistinguishable. The government has actually admitted that *Bay Sound* "is on all fours with the facts in *Tidewater*". See pages 8-9, *infra*.

In *Tidewater*, the United States District Court for the Eastern District of Louisiana concluded that, there, the obtaining of surtax exemptions was neither a *major* purpose for the creation of the corporate subsidiaries under Section 1551, nor the *principal* purpose under Section 269. Therefore, the separate exemption for each individual corporation in the LaBorde fleet was permitted. The government elected not to appeal that decision, so that the *Tidewater* corporations received the advantage of a separate surtax exemption for each separate corporation for all taxable years at issue.

Bay Sound was tried in the Southern District of Texas, which first held that surtax avoidance was a major purpose of the formation of the separate corporations, and denied the separate surtax exemption under Section 1551.[2] The Fifth Circuit reversed, on the ground that Section 1551 was not applicable to the case, and remanded for determination of whether tax avoidance was the principal purpose for the formation of the separate corporations under Section 269.[3] Accordingly, the burden which the taxpayers had to carry in order to maintain the exemption in *Bay Sound* was not as great as the burden which the taxpayers had to carry in *Tidewater*. Nevertheless, on remand, and on the same evidence, the Southern District of Texas now held that tax avoidance was the principal purpose for the formation of the separate corporations in *Bay Sound* and again disallowed the exemptions.[4]

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2. Unofficially reported at 67-2 USTC ¶9641.

3. The panel that heard the first appeal referred to the record as presenting facts "which might suggest a contrary conclusion under Section 269." 410 F.2d 505, 512.

4. It is submitted that this decision is clearly erroneous on the facts of this case even though *Tidewater* be completely ignored,

(Footnote 4 Continued)

The taxpayers again appealed, pointing out the obviously preferential treatment granted to *Tidewater* by the gov-

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(Footnote 4 Continued)

which it cannot. The only evidence in this case showed without contradiction that the principal purpose was to isolate exposure to tort liability. The salient point in the evidence was the fact that the fleet's longtime admiralty attorney (Clarence Eastham) had advised the formation of these corporations in order to minimize exposure to tort liability and he so testified without contradiction. The district court (finding No. 54, R. 1580) rejected such testimony because the first of the corporations in question had been formed in 1955, and the admiralty attorney's advice had been given before that and hence before the decision of the Supreme Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

From the transcript of the hearing on remand (at which no new evidence was taken) it becomes apparent how the district court fell into egregious error. ***The trial judge decided the case on the basis of something he thought was in the record but was not.*** At the November 16, 1970 hearing before the district court on remand, the trial judge commented as follows (p. 13 of transcript):

> THE COURT: Well, it's sort of coming back to me a little. Now, on that point, I was a little influenced by a discovery—I briefed the case in person, * * * and Mr. [Clarence] Eastham [testified] very strongly in reference to a case [*Rogers v. Missouri Pacific*] that came out two and one-half years after he * * * advised with reference to the matter that he had apparently relied on, so I thought he was a little farsighted.

The district court's decision clearly was not based on any testimony in the record. Clarence Eastham nowhere testified about the *Rogers v. Missouri Pacific* case. He never mentioned it. Neither did the other admiralty attorney, Mr. Emmett. Nor did any other witness. (The only reference we had made to that case occurred in our Proposed Conclusions of Law.)

Secondly, in the absence of any such testimony by Mr. Eastham, it was a complete ***non sequitur*** for the trial court to have based its decision—as it clearly did—on the fact that *Rogers v. Missouri Pacific* was decided after the key point of time in question. For, as our brief in the Fifth Circuit (pp. 25-38) developed in detail, *Rogers v. Missouri Pacific*, a railroad case, was simply another in a lengthy string of decisions which, along with a more active plaintiffs' bar, increasingly larger awards, and statutory enactments favoring claimants, had been subjecting shipowners to greater liability. Such trend, which had been well entrenched for years before 1955, caused the

(Footnote 4 Continued)

ernment's failure to appeal the decision in favor of the taxpayers in that case, while continuing to pursue the identically placed taxpayers in this case.

Nevertheless, in the face of the government's action in failing to appeal the decision favorable to the taxpayers in the identical *Tidewater* case, the Fifth Circuit affirmed, in a one-paragraph *per curiam*, the decision adverse to the taxpayers in *Bay Sound*.

If the Fifth Circuit's decision in our case is allowed to stand, the ultimate result will be that the Edwards fleet will be denied separate surtax exemptions for the separate corporations while the LaBorde fleet has been allowed all such exemptions under identical facts, which the government itself has emphatically stated to be "on all fours" with *Bay Sound*, or even more favorable to the taxpayers in *Bay Sound* than in *Tidewater*.

This application for certiorari has been filed primarily to raise the question of whether such obviously discriminatory treatment of the taxpayers by the government, with the aid of the courts, is permissible under the Constitution and laws of the United States.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The Fifth Circuit's affirmance, without reasoning, justification or analysis, perpetuated the demonstrably flagrant

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individual incorporation of each new vessel beginning that year, in an effort to achieve the result (i.e., limitation of liability to the vessel at fault) that the century-old Limitation of Shipowners Liability Act formerly, but no longer, afforded.

Thus, there can be no question but that the district court committed flagrant error—both as to law and fact—upon which its decision was based.

error of the district court,[5] an error so gross as to call for summary reversal. But there is a broader and even more compelling reason for this Court to hear and reverse this case. By its different treatment of *Tidewater* and *Bay Sound*, the government has perpetrated an intentional and irrational discrimination against *Bay Sound*.

In the briefs it filed in *Tidewater*, the government there solemnly declared, first, that *Bay Sound* "is on all fours with the facts in *Tidewater*"; second, that the application of Section 269[6] was "undoubtedly prevented" in *Bay Sound;* and third, that the taxpayers in *Bay Sound* had *a much stronger* claim for separate surtax-exemptions than did the *Tidewater* taxpayers. Indeed, in *Tidewater*, the government painstakingly spelled out six reasons why the instant taxpayers' case is a much stronger case for the taxpayers than *Tidewater*. In spite of this, the district court in *Tidewater* held that tax avoidance was not even "a major purpose" under Section 1551—let alone "the principal purpose" under Section 269— for individually incorporating each vessel.

The government, faced with the ongoing litigation in the instant case in which it had won the first round, did not appeal *Tidewater*.

The admissions made by the government in *Tidewater*, insofar as they relate to this case, are of sufficient importance to set forth at some length. They are as follows:

> * * * the * * * recent decision in *Bay Sound Transp. Co. v. United States* (S.D. Tex.), decided August 30, 1967 (20 A.F.T.R.2d 5418), *is on all*

5. See Footnote 4, *supra*.

6. This is the Section under which the government is now proceeding.

fours with the facts in Tidewater and should be determinative of the question involved * * * The facts in this case [*Bay Sound*] parallel those in the present case [*Tidewater*] to a remarkable degree. In short, the taxpayers were 21 corporations, each organized to acquire title to a single boat or barge. In support of the utilization of separate corporations, the taxpayers relied primarily on the need to spread or limit liability * * *

In addition to limitation of liability, the taxpayers urged other business reasons, namely, a preferable position in the event of labor troubles, that the transfer of stock would be facilitated, and a banker's wish that separate corporations be utilized * * *

The operational similarities between the Edwards fleet and the Tidewater fleet are remarkable. The Edwards fleet engaged in the transportation of crude oil and other petroleum products from field gathering points to refineries. Some of these gathering points were in the swamp areas in Southern Louisiana and the offshore wells on the Texas and Louisiana coasts. Thus, the Edwards fleet engaged in the transportation of petroleum products in the Gulf of Mexico and was subject to the same hazards and risks of operation as were experienced by Tidewater * * *

The [district] court concluded, applying Section 1551,[7] that a major purpose for the formation of separate corporations to own each boat was to acquire the additional surtax exemptions * * *

It is the government's strenuous contention that the facts in Tidewater are even stronger in favor of disallowance of the surtax exemptions than those present in Bay Sound Transp. Co. v. United States,

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7. Section 1551 was later held inapplicable to *Bay Sound* on its first appeal.

supra. First, the Tidewater corporations advanced only one business reason for utilizing separate corporations, namely, limitation of liability. This position was rejected by the court in *Bay Sound,* with the court relying primarily on the history of claims against the companies * * *. [T]he amount of claims or damages paid by the Edwards fleet far exceeds that paid by the Tidewater fleet.

Secondly, an admiralty attorney had expressly advised Mr. Edwards and another individual, owning an interest in the corporations, about the limitation of liability which could be achieved by separate incorporations. No such advice was received from any admiralty attorney in the case of Tidewater.

Thirdly, in *Bay Sound,* there is no indication that the ship owned by each corporation was mortgaged to secure the indebtedness of all the other corporations * * * In effect, the Edwards fleet at least maintained limitation of liability with respect to its dealings with financial institutions, unlike Tidewater, in which each corporation mortgaged its vessel to secure the total indebtedness.

"Fourthly, in *Bay Sound,* there were other business reasons for utilizing separate corporations, namely, avoidance of union troubles and the desire of a banking institution. In Tidewater, the only business reason advanced is limitation of liability, and the Whitney National Bank actively opposed the use of separate corporations.

Fifthly, there was no written evidence or other documents directly reflecting tax avoidance considerations in the organization of separate corporations in *Bay Sound.* In effect, *the only evidence there was that the individuals involved were made aware of the tax consequences* and had this before them * * *. In Tidewater there is written and contemporaneous evi-

dence of the active consideration of the tax advantages to be employed through utilizing multiple corporations * * *.

Sixthly, in Tidewater, there were additional documents in which the Tidewater people represented to potential investors * * * that the insurance carried by the company was adequate * * *. Tidewater, through its bareboat charter agreements, attempted to pass on all risks of operation and its resulting liability, and the history of claims and damages paid by the Tidewater vessels clearly reflect the fact that liability was effectively passed on, except in minimal amounts.

While *Bay Sound Transp. Co. v. United States, supra,* represents an attack on multiple corporations under Section 1551, it will be demonstrated henceforth that Section 1551 is in fact applicable to 12 of the 14 Tidewater subsidiaries. Notwithstanding, the government contends that the principal purpose for the creation and acquisition of control of the Tidewater subsidiary corporations by Tidewater Marine Service, Inc., the parent corporation, was to secure the additional surtax exemptions available therefrom. The court should find that this was *the principal purpose,* for the reason that there was clear and express evidence of the tax avoidance motives. *The absence of such evidence in Bay Sound undoubtedly prevented the application of Section 269* * * *" Pp.148-152 of the government's Brief in *Tidewater.* (Emphasis added in part.)

After this conscious and deliberate statement to the court in *Tidewater* that there was an absence of evidence of tax avoidance motives in *Bay Sound* (which had already been tried and won by the government on the first hearing), and that the "absence of such evidence in *Bay Sound* undoubtedly prevented the application of Sec-

tion 269", the government had, one might almost say, the effrontery, on the remand, and on not a syllable of additional evidence, to continue to pursue *Bay Sound* under that very section, and to persuade the trial court, on the identical evidence, that tax avoidance was, after all, the "principal purpose".

The evidence of tax avoidance motives which was absent from *Bay Sound* on the first trial, was still absent on the trial on remand, the remand having been heard on the same identical record. Notwithstanding this admitted absence of evidence, and in the face of the government's admissions in *Tidewater*, the government was permitted to pursue this case, and the trial court was permitted to hold that the absent evidence was after all there.

This palpably unfair treatment of the taxpayers ought not, in good conscience, be permitted to stand.

Deprivation of Property Without Due Process

Our position is that, given the government's deliberate representations in its *Tidewater* briefs that the *Tidewater* taxpayers had much less entitlement to the surtax exemptions than do the petitioners here, the government had a duty to either (1) appeal *Tidewater*, or (2) withdraw its contest of our case.

This position is based on the proposition that it is an unconstitutional taking of property without due process, in violation of the Fifth Amendment, for the government intentionally and irrationally to exact a federal tax in an unequal manner. That is discrimination.

The same office of the Justice Department handled the trials in both cases, from both of which an appeal would lie to the same appellate court.

Thus the courts, as well as the Justice Department, were guilty of such intentional and irrational discrimination here. Both the district court on remand and the Fifth Circuit on our second appeal were faced with the reality of the government's admission that our taxpayers were much more strongly entitled to the surtax exemptions than were the *Tidewater* taxpayers, but that the government had failed to appeal *Tidewater*. The district court on remand and the Fifth Circuit both knew, because the government had admitted, that the *Tidewater* taxpayers, who had won, were less entitled to the surtax exemptions than were the instant taxpayers; and both courts knew that the government had not appealed *Tidewater*.

The unfortunate result of the government's action, of the trial court's decision, and the Fifth Circuit's *per curiam* affirmance, is that two groups of taxpayers (Tidewater and Bay Sound), in substantially similar positions, are being treated entirely differently. This unfairness is exacerbated by the fact that in *Tidewater* the government told the court that Section 269, the very section under which this case was earlier remanded for consideration, could not apply here; and that the present case was much stronger for the taxpayers than was *Tidewater*.

The different treatment of these taxpayers from those in *Tidewater*, which the government did not appeal, is a gross injustice which the government should not be permitted to perpetrate.

In the recent case of *Farmers' and Merchants' Bank v. United States*[8] (discussed below), the Fourth Circuit reiterated the principle that all taxpayers "are entitled to a nondiscriminatory administration of the tax laws"; and

8. 476 F.2d 406 (4th Cir., 1973).

that the government "has a duty of consistency toward similarly situated taxpayers." The duty of a court within its jurisdiction should be no less.

The government is in no position to argue that *Bay Sound* and *Tidewater* were two different "fact" cases, either of which could have gone either way. On the contrary, the government has officially declared—not merely that the two groups are indistinguishably similar —but that our group is much more strongly entitled to the exemptions.[9]

Regardless of whether this court adheres to its 1900 construction[10] of the uniformity clause in Section 8 of Article I of the Constitution as requiring only a geographic uniformity, the due process clause of the Fifth Amendment requires uniformity in the sense of equality —i.e., nondiscrimination.

This obvious principle is exemplified by (1) the 1965 decision of the Court of Claims in the *IBM* case;[11] (2) the decision of the United States Court of Appeals for the Fourth Circuit in *Farmers' and Merchants' Bank v. United States,*[12] *supra,* decided April 6, 1973; and (3) the decision of the United States Court of Appeals for the Second Circuit in *Sirbo Holdings, Inc. v. Commissioner,*[13] decided March 23, 1973.

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9. To the government's credit, it has always acknowledged such admission and has never sought to retract or retreat from it.

10. In *Knowlton v. Moore,* 178 U.S. 41, 20 S.Ct. 747, 44 L.E. 969 (1900).

11. *International Business Machines v. United States,* 343 F.2d 914 (Ct. Cls., 1965), certiorari denied, 382 U.S. 1028.

12. 476 F.2d 406 (4th Cir. 1973).

13. 476 F.2d 981 (2d Cir. 1973).

The *IBM* case and the recent *Farmers' and Merchants' Bank* case rejected attempts by the Internal Revenue Service to apply the tax law differently to different taxpayers.

The *Farmers' and Merchants'* decision of the Fourth Circuit this year permitted favorable but legally erroneous tax treatment to the taxpayer because other taxpayers had enjoyed the claimed tax benefit. Referring to "an overriding principle of 'equal' tax treatment," the Fourth Circuit, reversing the district court, refused to countenance unequal treatment of similarly-situated taxpayers, regardless of the fact that, as an original proposition, the taxpayer was not legally entitled to the relief granted.

The Fourth Circuit held:

> "The Commissioner cannot tax one and not tax another without some rational basis for the difference."[14]

Here such unequal taxation would be completely irrational, based on the government's own admissions. We ask only for the right to the equal tax treatment that the Fourth Circuit decreed.

The recent *Sirbo Holdings* case rejected an effort by the Justice Department to abandon its objection to capital gains treatment of a taxpayer in one case while continuing to contest such treatment in another case having seemingly identical facts. The government had con-

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14. 476 F.2d, p. 409, quoting Justice Frankfurter's concurring opinion in *United States v. Kaiser*, 363 U.S. 299, 308, 80 S.Ct. 1204, 1210, 4 L.E.2d 1233 (1960). This principle also was quoted in *Dixon v. United States*, 381 U.S. 68, 77, 85 S.Ct. 1301, 14 L.Ed.2d 223, 229-230 (Ftnt. 9) (1965).

tested Sirbo Holdings' rights to capital gains treatment for a certain transaction and the Tax Court held for the government. Two months later the *Boston Fish Market* case came before the Tax Court. The government had abandoned its contest of capital gains treatment for Boston Fish Market and accordingly, the Tax Court allowed capital gains treatment in that case. *Sirbo Holdings* was then appealed to the Second Circuit which remanded the case back to the Tax Court in order to assure equality of treatment of the two taxpayers. The Second Circuit concluded that:

> The Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time * * *. That the Commissioner's seeming inconsistency may have arisen from the right hand's ignorance of the posture of the left is little solace to taxpayers who are entitled to a nondiscriminatory administration of the tax laws by him, much less to a taxpayer like Sirbo who is disadvantaged by the discrimination in its case.

It is respectfully submitted that the discrimination against Bay Sound in favor of Tidewater and the results thereby produced are parallel, if not identical, to those produced against Sirbo in favor of Boston Fish Market, and that due process requires the correction of such inequity by this Honorable Court.

Conflict Among the Circuits

In addition to the Constitutional argument set forth above, we submit that there is an effective conflict between

the Second and Fourth Circuits on the one hand and the Fifth Circuit on the other on the question of the government's power to treat taxpayers differently where no rational reason exists for the different treatment. The Fifth Circuit, in rejecting without comment the arguments presented as to the discriminatory treatment of *Bay Sound* as compared with *Tidewater*, has tacitly held that the government may exact taxes unequally from taxpayers in the same position. It has held that the government is free to exact taxes from the *Bay Sound* group even though it intentionally failed to exact taxes from the *Tidewater* group in a factual situation which the government admits is on all fours. Actually, as pointed out above, the government admits that the *Bay Sound* group is even more clearly entitled to the exemptions at issue than was the *Tidewater* group. It is submitted that this decision is diametrically opposed to the decision of the Fourth Circuit in *Farmers' and Merchants' Bank v. United States, supra,* handed down six days before the decision in the instant case, as well as the decision of the Second Circuit in *Sirbo Holdings, Inc. v. Commissioner, supra,* handed down twenty days before the decision in the instant case.

The issue involved in the *Farmers' and Merchants'* case is described by the Fourth Circuit as follows:

> The point of this appeal is that the government in 1964 let some other banks include Federal funds sold as outstanding loans in calculating their bad debt reserve, but without reason denied this privilege to the appellant. It does so by a 1968 Internal Revenue ruling . . . that allows the benefit of such an inclusion only to a bank which claimed it in its return for a taxable year prior to November, 1968.

> Thus it refused Appellant this privilege because it was not asserted in its 1964 return, but, rather, by way of a timely claim for refund in 1966.

The Fourth Circuit ruled that the government could not so discriminate against Farmers' and Merchants' Bank.

Obviously the Fourth Circuit would not have permitted the government to discriminate in favor of Tidewater and against Bay Sound as was permitted by the Fifth Circuit. This is so because the government's action in the instant case constitutes a much clearer example of discriminating in favor of one and against another taxpayer group in identical positions. There was a basis for distinguishing the position of the banks which had claimed the deduction on their original returns from that of the Farmers' and Merchants' Bank which had not. The court concluded that this was not a sufficiently rational basis for the distinction. Even this insufficient distinction is absent in the Bay Sound-Tidewater comparison. Both Tidewater and Bay Sound paid the taxes in question under protest and sued for a refund. The government admitted that *Bay Sound* is legally indistinguishable from *Tidewater*. Nevertheless, the government intentionally and discriminatorily acquiesced in permitting Tidewater to escape liability for the tax by failing to appeal the district court decision while contesting its admittedly weaker case on remand and in the Fifth Circuit, thereby exacting the tax from Bay Sound.

The only conceivable distinction which could be made between the two cases is that the discrimination in *Farmers' and Merchants'* resulted from a ruling of the Internal Revenue Service whereas the discrimination in *Bay Sound* vis-a-vis *Tidewater* results from the decisions of the Department of Justice as well as the Internal

Revenue Service in determining which cases to pursue and which to abandon in tax litigation. This, we submit, is obviously a distinction without difference. The discrimination between taxpayers in the same situation is the same in either case and in each case results from a discriminatory decision by an agency of the executive branch of the federal government. Whether that decision is made by the Internal Revenue Service or by the Justice Department can make no difference. Moreover, the Internal Revenue Service participates in the decisions which are made by the Justice Department in the area of tax litigation and the discrimination in the instant case is as effectively discrimination by the Internal Revenue Service in the application of the tax laws as it was in *Farmers' and Merchants'*.

Even if such difference between the instant case and *Farmers' and Merchants'* were considered a valid distinction, there nevertheless would still be conflict between the Circuits because there is no material distinction whatsoever between the instant case and the decision of the Second Circuit in *Sirbo Holdings, supra.* Both the instant case and *Sirbo Holdings* involve the simultaneous conduct of tax litigation against two taxpayers in essentially the same position. The discrimination in each case resulted from the Justice Department's abandonment of a contest against one group of taxpayers and contrary persistence in the contest against the other group of taxpayers. The Second Circuit refused to countenance such discriminatory treatment. The Fifth Circuit acquiesced in such discriminatory treatment without comment.

The instant case and *Tidewater* were conducted simultaneously in the United States District Courts for the

Southern District of Texas and the Eastern District of Louisiana, respectively, and the government initially contested the taxpayers' right to separate corporate surtax exemptions in each case. *Sirbo Holdings* and *Boston Fish Market* were two cases conducted simultaneously before different judges of the Tax Court. The government initially contested the right of the taxpayer to capital gains treatment in each case.

In *Tidewater*, the district court found in favor of the taxpayers and the government elected not to appeal.[15] The district court found in favor of the government in *Bay Sound* and the government elected to contest the appeal of that decision by Bay Sound. In *Boston Fish Market*, the government in the course of the litigation abandoned its challenge to the propriety of capital gains treatment. In *Sirbo Holdings*, the government continued to contest the rights of the taxpayer to capital gains treatment.

The taxpayers in *Bay Sound* argued strenuously in both the district court and the Fifth Circuit the decision in *Tidewater* and the government's admissions therein. The taxpayer in *Sirbo Holdings* argued the *Boston Fish Market* decision first on a motion for reconsideration in the Tax Court and eventually by appeal to the Second Circuit.

Here, and only here, the two sets of cases diverge in result. The Fifth Circuit affirmed the district court de-

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15. Actually, the government initially filed a notice of appeal in the district court and subsequently filed a joint stipulation of dismissal of its appeal in the same court. This voluntary dismissal on October 2, 1968, constituted a deliberate and active acquiescence in the granting of separate surtax exemptions to Tidewater. The government's acquiescence in the granting of capital gains treatment to Boston Fish Market was only passive—it failed to brief that issue in the Tax Court. Thus, the discrimination is clearer and more overt in the instant case than it was in *Sirbo Holdings*.

cision adverse to *Bay Sound* without any opinion and without even addressing itself to the question of discriminatory treatment in favor of Tidewater and against Bay Sound. The Second Circuit found discrimination in favor of Boston Fish Market and against Sirbo Holdings and remanded the *Sirbo Holdings* case in order either to reconcile the two decisions or to assure equal treatment of Sirbo Holdings by reversal.[16]

Remand was presumably necessary in *Sirbo* to determine whether the factual situations in the two cases were truly the same. Such is unnecessary in the instant case because the government not only admitted but strenuously argued that the facts of the two cases are on all fours.

The discrimination is even more unconscionable in this case than in *Sirbo Holdings.* In *Sirbo Holdings,* the court suggested that "the Commissioner's seeming inconsistency may have arisen from the right hand's ignorance of the posture of the left." The Second Circuit held such a reason to be insufficient. The government's attorneys in *Bay Sound* and *Tidewater* were obviously aware of developments in both cases. The government's briefs in *Tidewater* (Eastern District of Louisiana) strongly relied on the district court decision in *Bay Sound.* The taxpayers' briefs in *Bay Sound* (Fifth Circuit) strongly relied on *Tidewater.* The government's inconsistency was deliberate and constituted the grossest kind of discrimination.

---

16. The Second Circuit did not state whether the government's obligation to treat taxpayers equally was constitutionally imposed under the Due Process Clause of the Fifth Amendment. It is submitted that regardless of whether the issue is a constitutional one, it is of such tremendous importance as to require this Court to resolve the conflict between the circuits.

It is respectfully submitted that if the West Virginia taxpayer in *Farmers' and Merchants'* and the New York taxpayer in *Sirbo Holdings* are entitled to nondiscriminatory treatment in the exaction of taxes, then the Texas taxpayers in *Bay Sound* should also be entitled to nondiscriminatory treatment. Or else, this Court should rule that taxpayers are not entitled to equal and nondiscriminatory treatment. Certainly the rights of the taxpayer cannot be made to depend on which of the Circuit Courts of Appeals has territorial jurisdiction over its domicile. The writ should be granted and the issue decided on a nationwide basis.

It is respectfully submitted that the position of the Second and Fourth Circuits barring discriminatory exaction of taxes from one taxpayer while failing to exact taxes from others in essentially the same position is legally correct and should be embraced by this Honorable Court for the nation as a whole.[17]

CONCLUSION

It is respectfully submitted that this Honorable Court should grant the writ in this case in order (1) to determine whether due process requires equal treatment of identically situated taxpayers, and (2) to resolve the conflict between the Fifth Circuit on the one hand and the Second and Fourth Circuits on the other hand on the question of whether the government can exact a tax from one taxpayer and not from another without any reasonable basis for the distinction. It is further submitted that

17. Also persuasive on the issue before the Court is the decision of the United States Court of Claims in *International Business Machines Corporation v. United States, supra.* This case involved IBM and

(Footnote 17 Continued)

this Court should, in due course, rule that the government may not exact a tax from one taxpayer and not from another where there is no rational basis for the

---

(Footnote 17 Continued)

Remington Rand which were both engaged in the business of manufacturing large electronic computing systems just as Bay Sound and Tidewater were both involved in the shipping business. Prior to April, 1955, both IBM and Remington paid the 10 percent "business machines" tax. Remington obtained an exemption from the Internal Revenue Service in the middle of April, 1955, and the exemption continued until February 1, 1958. Shortly after learning of this ruling, IBM sought (in July, 1955) an "immediate ruling" to the same effect for its identical equipment. Two and a half years later the Service rejected IBM's request and two months thereafter it made Remington's equipment taxable for the future. IBM claimed that it should be freed from the tax during the period of time that Remington was free under principles of equal treatment.

The court noted that the Internal Revenue Service may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect, but that, inasmuch as discretion was granted to the government in such cases, there was implicit in such grant of discretion an obligation to consider the totality of the circumstances surrounding the handing down of a ruling, including the comparative or differential effect on the other taxpayers in the same class. It was stated that:

> "Equality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed."

The Tax Court quoted Justice Frankfurter's concurring opinion in *Kaiser* to the effect that "the Commissioner cannot tax one and not tax another without some rational basis for the difference," and ruled that IBM had to be given the same treatment as Remington had been given for the period in question.

The reasoning of the *IBM* case applies equally to the instant case. The Justice Department has discretion in determining which tax cases to pursue and which to abandon just as the Internal Revenue Service has discretion as to whether to give retroactive effect to a ruling or regulation. Such a grant of discretion carries with it a parallel obligation not to discriminate against one taxpayer in favor of another in the same position in the exercise of such discretion. This rationale is sound and supports our position in this case as well as the decisions of the Fourth and Second Circuits in ***Farmers' and Merchants' Bank*** and ***Sirbo Holdings,*** respectively.

distinction. This petition should be granted and the case reversed, by summary reversal or plenary review.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served on the United States by air mailing, with postage prepaid, on this the _____ day of November, 1973, the same to the following:

(1) Robert H. Bork, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

(2) Meyer Rothwacks, Esquire
Chief, Appellate Section
Tax Division
Department of Justice
Washington, D. C. 20530

JOHN A. BAILEY

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America: Article I, Section 8 (First clause)

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, To pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

Amendment V

* * * No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 269 [Before its amendment by P.L. 88-272, §235(c)(2), effective for taxable years ending after Dec. 31, 1963.] ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate To Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

LIBRARY
SUPREME COURT, U. S.

NO. 73-799

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al.,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

Opinions, Judgments and Orders of United States Court of Appeals for the Fifth Circuit and United States District Court (S.D. Tex.)

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INDEX

	Page
Opinion of United States Court of Appeals for the Fifth Circuit (April 30, 1969)	1
Judgment of United States Court of Appeals for the Fifth Circuit (April 30, 1969) and Order Amending Judgment (June 3, 1969)	9
Order of United States Court of Appeals for the Fifth Circuit Overruling Petition for Rehearing (May 30, 1969)	11
Opinion of United States District Court for the Southern District of Texas (August 30, 1967)	12
Memorandum Decision, 396 U.S. 928, 90 S.Ct. 263 (1969)	65
Memorandum Decision, 396 U.S. 1031, 90 S.Ct. 549 (1970)	65
Memorandum Opinion and Supplemental Findings of Fact (May 26, 1972)	66
Judgment entered August 7, 1972 in C.A. No. 63-H-73 (Bay Sound Transportation Co. et al. v. United States of America)	87
Opinion (Per Curiam) of United States Court of Appeals for the Fifth Circuit (April 12, 1973)	91
Order of United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Petition for Rehearing En Banc (June 28, 1973)	92

NO. _____

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al.,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

Opinions, Judgments and Orders of United States Court of Appeals for the Fifth Circuit and United States District Court (S.D. Tex.)

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

(April 30, 1969)

* * *

MORGAN, Circuit Judge: These related income tax refund actions were consolidated and tried before the District Court [67-2 USTC ¶9641] sitting without a jury. This appeal by the taxpayers is taken from portions of twenty-six (26) judgments of the District Court. The three issues presented to this Court are:

* * *

> 3. Whether the "principal" or "major" purpose for the formation of multiple corporations was tax avoidance. Sections 269 and 1551 of the Internal Revenue Code of 1954.

C. W. Edwards is the prime founder and still operates to a large extent a number of partnerships and corporations engaged in the business of hauling crude oil and distillate in the Louisiana and Texas coastal areas.

Edwards Transportation Company is the parent organization. It is a partnership set up in the early 1930's by C. W. Edwards and another individual, now deceased. In 1939, Edwards organized his first corporation, Barge Transport Company, for the benefit of his son, Keith Edwards. From its inception, Barge Transport Company has conducted its business within the framework of the entire Edwards organization. At the time of the trial in the court below Edwards was in his 70th year.

In 1955, it was decided that each newly acquired towboat, pushboat, and barge should be owned and operated by separate corporations. Accordingly, by June, 1966, the time of the trial below, nineteen separate business organizations—one partnership and eighteen corporations —each owned one of the nineteen new vessels.

The Commissioner of Internal Revenue disallowed the surtax exemptions of the corporate taxpayers under Section 269[1] of the Internal Revenue Code, contending that

---

[1] *Section 269, Internal Revenue Code of 1954:*

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate To Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

the several corporations were formed for the "principal purpose" of tax avoidance. Taxpayers contend that the principal purpose for creating multiple corporations was to limit the liability of the Edwards enterprise. They allege several other purposes for incorporating multiple businesses, and assert that tax considerations took a minor role.

The District Court, following a non-jury trial of the case, found that the entire enterprise should be treated as a single business entity, rather than as separate corporations. Although the Court did not specifically so state, it bottomed its opinion of Section 1551 of the Code.[2]

---

[2] *Section 1551, Internal Revenue Code of 1954:*

SEC. 1551. [Prior to its amendment by the Revenue Act of 1964]. DISALLOWANCE OF SURTAX EXEMPTION AND ACCUMULATED EARNINGS CREDIT.

If any corportation transfers * * * all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c), or the * * * accumulated earnings credit provided in * * * section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership * * *, the ownership of stock shall be determined in accordance with the provisions of section 544, except that constructive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. * * *

It did not rely on Section 269, as was urged by the Commissioner.

* * *

On the multiple corporate issue, although the District Court did not specifically so hold, it is evident from reading the lower Court's memorandum opinion that the Court relied on Section 1551 of the Code instead of Section 296(a), as was urged by the Commissioner in denying the taxpayers' separate surtax exemptions.

Section 1551 is explicit in its requirement that the transferor of property to the newly established transferee corporate body must itself be a corporation. If the transferor was not a corporation, then Section 1551 is inapplicable. The Commissioner maintains that the transferor was Barge Transport Company, a corporation; that it was Barge Transport Company which transferred the newly constructed vehicles to the new corporations. The Commissioner urges that this Court hold that such a finding is implicit in the lower Court's memorandum opinion, even though the lower Court did not make that finding.

An examination of the entire record has failed to reveal any evidence that Barge Transport Company, or any other corporation, transferred the vessels to the new corporations so as to bring these various corporations within the purview of Section 1551.

The Commissioner contends that each of the 18 corporations to which Section 1551 applies was acquired in essentially the same manner. The decision to construct the vessel was made by C. W. Edwards, the vice president of the Barge Transport Company, the original corporation,

after consulting with his son, Keith Edwards, the president, Jack Redding, the secretary and treasurer, of Barge Transport Company, and others. While the vessel was under construction, and about the time for delivery thereof, financing of the cost would be arranged. After the decision to construct each vessel was made, and the order therefor was placed with the company doing the construction work, a new corporation was organized to receive the vessel when completed. All property rights that existed in the vessel were acquired by the new corporation, and when and as the vessel was completed and delivered the new corporation took title. Each corporation acquired only one vessel. The above-summarized evidence is insufficient to support the conclusion that there was a transfer of property from Barge Transport Company to the newly acquired corporations.

The surtax exemptions here in question were not properly disallowed under the provisions of Section 1551. However, the Government contends that, if the Court does not agree that the record will support no finding other than that tax avoidance was the principal purpose of the transactions in question, the case should be remanded to the District Court for additional findings as to the applicability of Section 269. We agree that if Section 1551 is not applicable that this Court should direct that the case be remanded for the District Court to determine if Section 269 is applicable to these transactions and also to the transfers of the vessels *CT&J* and *Toni Ann*.[8]

As its title denotes, Section 269 is designed to prevent "acquisitions made to evade or avoid income tax." How-

[8] These two vessels were transferred to Bay Sound Transportation Company and Riverside Transportation Company from Louisiana Transportation Company, a partnership.

ever, the section is applicable only in certain carefully circumscribed situations—it may be invoked only where there has been an acquisition of control, the *principal purpose* of which is evasion or avoidance of taxes.

Section 269 provides that if any person acquires control of a corporation and the principal purpose of this acquisition is evasion of income taxes by securing the benefit of a deduction, credit, or other allowance, which he would not otherwise enjoy, then the deduction credit or allowance may be disallowed. The determination of the taxpayer's principal purpose in incorporation is a question of fact that depends upon the intent of the taxpayer at the time he acquires control of the corporation. See *Airport Grove Corp. of Polk County, et al. v. United States of America,* 5 Cir., 1969 [69-1 USTC ¶9267]—F.2d—[No. 25701, March 11, 1169]. The taxpayer has the burden of proving that control was not acquired for the unlawful purpose. *American Pipe & Steel Corp. v. Commissioner* [57-1 USTC ¶9590], 343 F.2d 125 (9 Cir., 1957).

The District Court did not make findings on the question of taxpayers' "principal purpose" under Section 269(a). The issue of "principal purpose" is one of fact. For this Court to hold that the "principal purpose" of these transactions was "evasion or avoidance of federal income tax," when the Court below failed to consider this matter, and when the facts might suggest a contrary conclusion under Section 269, would be wholly inappropriate. In cases tried without a jury, Federal Rules of Civil Procedure 52(a) directs the District Court to determine the essential facts upon which it bases its judgment; where the trial Court fails to do so, this Court cannot make such

findings of fact. *S. S. Silberblatt, Inc. v. United States ex rel. Lambert Corp.*, 353 F.2d 545, 549-550 (5 Cir., 1965).

* * *

We disagree with the disallowance of the surtax exemptions under Section 1551 and REMAND the case to the District Court to determine whether or not the findings of fact on the record are sufficient to disallow the exemptions of the surtax under Section 269.

AFFIRMED in part; REVERSED and REMANDED in part for further proceedings not inconsistent herewith.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25,729

D. C. Docket Nos. CA 63-H-73, 75 thru 99
and 66-H-462

BAY SOUND TRANSPORTATION COMPANY,
ET AL., *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal From The United States District Court
For The Southern District of Texas

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed and remanded in part for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that appellants be condemned to pay one-half of the costs in this Court, and appellee be condemned to pay one-half of said costs.

April 30, 1969

Issued as Mandate: June 13, 1969

ORDER AMENDING JUDGMENT

It is now hereby ORDERED and ADJUDGED by this Court that the prior judgment in the above-styled action, dated April 30, 1969, be amended as to the assessment of costs as follows:

The appellee is condemned to pay one-half of the costs to the extent expressly permitted by law, 28 U.S.C.A. § 2412(a). (The 1966 amendment to this statute not being applicable in that this action was filed before July 18, 1966, *Allen v. Rachal,* D.C. Tex., 1967, 283 F. Supp. 986). Appellant is condemned to pay all remaining costs.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25729

BAY SOUND TRANSPORTATION COMPANY, ET AL., *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal From The United States District Court For The Southern District of Texas

---

(Filed May 30, 1969)

ON PETITION FOR REHEARING

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

OPINION OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(Filed August 30, 1967)

Bay Sound Transportation Co. v. United States of America. Coastal Transportation Co. v. United States of America. The Christine Towing Co. v. United States of America. Riverside Transportation Co. v. United States of America. Murray Bay Transportation Co. v. United States of America. Dixon Bay Transportation Co. v. United States of America. Green Bay Transportation Co. v. United States of America. Erie Barge Co. v. United States of America. Ev Barge Co. v. United States of America. Gulf Storage Company, Inc. v. United States of America. Lavaca Barge Co. v. United States of America. Naptha Barge Co. v. United States of America. Navidad Barge Co. v. United States of America. Wolverine Barge Co. v. United States of America. Huron Barge Co. v. United States of America. Michigan Barge Co. v. United States of America. Superior Barge Co. v. United States of America. Ontario Barge Co. v. United States of America. St. Clair Barge Co. v. United States of America. Jack Barge Co. v. United States of America. C. W. Edwards & Letha C. Edwards v. United States of America. Keith S. Edwards & Mary Edwards v. United States of America. John E. Redding & Violet Redding v. United States of America. Everett L. Meley, Jr. & Helen D. Meley v. United States of America. Maurice H. Hoffman & Lurline M. Hoffman v. United States of America. J. E. Redding, Trustee of the Shirley & Garland Fielder Trust, & Garland W. Fielder v. United States of America. William N. Blair & Glynn Blair v. United States of America.

U. S. District Court, So. Dist. Tex., Houston Div., CA's. 63-H-73, 63-H-75-63-H-99, 63-H-462, 8/30/67.

Memorandum Opinion

Hannay, District Judge: These suits are for the recovery of claimed overpayment of income taxes and interest paid under protest by the various plaintiffs together with statutory interest; the names of the various plaintiffs, the taxable years involved in the various suits, and the aggregate amounts involved are as follows:

Plaintiff	Taxable years ending	Amount
Bay Sound Transportation Co.	2-29-60	$ 6,889.39
Coastal Transportation Co.	11-30-57/58/59	18,759.38
The Christine Towing Co.	1-31-59/60	19,074.09
Riverside Transportation Co.	11-30-59	7,444.25
Murray Bay Transportation Co.	3-31-60	8,441.99
Dixon Bay Transportation Co.	4-30-60	9,244.96
Green Bay Transportation Co.	7-31-59/60	17,615.73
Erie Barge Co.	2-28-59/60	4,134.23
Ev Barge Co.	12-31-58/59/60	22,018.87
Gulf Storage Co., Inc.	9-30-59/60	6,030.35
Lavaca Barge Co.	11-30-59/60	11,335.52
Naptha Barge Co.	12-31-58/59	19,112.31
Navidad Barge Co.	11-30-59/60	11,180.18
Wolverine Barge Co.	7-31-58/59/60	14,796.70
Huron Barge Co.	2-28-59/60	3,115.89
Michigan Barge Co.	2-28-59/60	4,422.33
Superior Barge Co.	2-28-59/60	4,422.33
Ontario Barge Co.	8-31-59/60	10,442.51
St. Clair Barge Co.	8-31-59/60	10,422.51
Jack Barge Co.	4-30-59/60	16,328.18
C. W. & Letha C. Edwards	12-31-58/59	88,704.60
Keith S. & Mary Edwards	12-31-58/59	67,134.93
John E. & Violet Redding	12-31-58/59	602.34
Everett L. & Helen D. Meley, Jr....	12-31-58/59	559.99
Maurice H. & Lurline M. Hoffman..	12-31-58/59	192.76
J. E. Redding, as Trustee of the Shirley & Garland Fielder Trust & Garland W. Fielder	12-31-58/59	232.25
Total Amount in Dispute		$382,678.57

The cases were tried to the Court without a jury. A number of motions with reference to the admission of evidence were taken with the case. They will be discussed and ruled upon later in this memorandum opinion.

QUESTIONS PRESENTED FOR DECISION

* * *

2. Whether the 21 corporations involved in the Edwards' boat and barge business are entitled to calculate their income taxes with the maximum of $25,000 of taxable income subject to the 30 percent rate (the balance being taxed at the 52 percent rate) as the Government contends, or with a maximum of $525,000 taxed at the 30 percent rate (the balance being taxed at 52 percent) as the corporate plaintiffs[2] contend.

Statutes and Regulations Involved

The text of the pertinent statutes and regulations are set out in their entirety in Appendix A, *infra.*

---

[2] The corporations involved in this issue are:

Name of Plaintiff	Civil Action No.
Bay Sound Transportation Co.	63-H-73
Coastal Transportation Co.	63-H-75
Christine Towing Co.	63-H-76
Riverside Transportation Co.	63-H-77
Murray Bay Transportation Co.	63-H-78
Dixon Bay Transportation Co.	63-H-79
Green Bay Transportation Co.	63-H-80
Erie Barge Co.	63-H-81
Ev Barge Co.	63-H-82
Gulf Storage Co., Inc.	63-H-83
Lavaca Barge Co.	63-H-84
Naptha Barge Co.	63-H-85
Navidad Barge Co.	63-H-86
Wolverine Barge Co.	63-H-87
Huron Barge Co.	63-H-88
Michigan Barge Co.	63-H-89
Superior Barge Co.	63-H-90
Ontario Barge Co.	63-H-91
St. Clair Barge Co.	63-H-92
Jack Barge Co.	63-H-93

Statement

Because of the complexity of the facts and the number of parties involved in these cases, the Government endeavored to make a complete and detailed statement of the facts offered into evidence, issue by issue:

* * *

*As to the depreciation issue:**

1. Mr. Charles W. Edwards who is now past 70 years old, originally went into the business of transporting crude oil and petroleum products by tank barge when he was a young man. (Tr. 78-79). Mr. Edwards' father, had been in the boat and towing business in and around Houston and Galveston, Texas, since 1889. (Tr. 39-43, 1384).

2. During and prior to the early 1930's, William Helis, of New Orleans, Louisiana, was active in the oil and gas exploration and production business. At that time Mr. Helis had considerable oil production in the swamp areas in South Louisiana. Mr. Edwards negotiated with Helis with the view to making a partnership for the purpose of transporting all of Helis' production from well sites or gathering points in the marsh areas to refineries. The resulting partnership in which each had a 50 percent interest, was known as Edwards Transportation Co. (Tr. 41-43). During 1950 Mr. Helis died, but Edwards Transportation Co. was continued, Mr. Helis' estate being substituted as a partner. The business activities of Edwards Transportation Co. (which were expanded during the late 1930's to serve the oil industry in general), have continued through the years and are still conducted from the company's headquarters in Houston.

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* Certain findings under "the depreciation issue" are reprinted here because they may have some relevance to the surtax-exemptions issue. (Footnote ours; not the Court's)

3. Edwards Transportation Co., during the mid 1930's, acquired four tug boats and seventeen barges. By date of trial of these cases, six barges had been disposed of. All of the vessels have been and are being used full time in Edwards Transportation Co.'s operations. The following tabulation reflects data with respect to all of the tug boats and barges owned and operated by Edwards Transportation Co. since its inception.

[Edwards Transportation Co. Chart on next page.]

4. During the 1930's and 1940's, as Edwards Transportation Co.'s business grew and services were being performed for the oil industry in general, additional vessels were acquired. The next vessels utilized in the Edwards organization were owned by a corporation known as Barge Transport Co., organized July 27, 1939. Mr. Charles Edwards (the partner in Edwards Transportation Co.) years ago owned most of the stock in this corporation and transferred such in trust for benefit of his son, Keith. (Tr. 80-83). Before the taxable years involved in this suit, the stock was distributed to Keith so that during the years in suit he owned such stock. (Tr. 80-84; G. Exs. 7 & 8, pars. 7).

5. The activities of Barge Transport Co. were essentially the same as Edwards Transportation Co. (Tr. 80-86), and during the years from its inception the corporation owned and operated two tug boats, five barges, and one small boat. Data with respect to all of the corporation's vessels are as follows:

[Barge Transport Co. Chart on next page.]

6. Edwards Transportation Co. and Barge Transport Co. have always operated out of Houston. As these two com-

EDWARDS TRANSPORTATION CO.

Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds received on Disposition	Age at Date of Trial of this case	Normal Depth of Vessel	Reference in Trial Record as to Source of Data
Betty H.	Tug	1920	1920	$50,000					P. Dis. 4, 14	
George Hannon	Tug	1920	1920	50,000						
Keith Sterling	Tug	1920	1920	50,000					G. Dis. 5, 6	
Mary C.	Barge	1920	1920	15,000						Pets. 45
Hiram Kline	Barge	1920	1920	15,000						
Curtis Jr.	Barge	1920	1920	15,000						
Brian	Barge	1920	1920	15,000						
C. W. Dow	Barge	1920	1920	17,000						
Peggy Clyde	Barge	1920	1920	17,000	6-30-61	XX	$2,500	XX		
Charles Kelley	Barge	1920	1920	17,000	6-30-61		2,500			
W. J. Wyatt	Barge	1920	1920	17,000	6-30-61		2,500			
Pearl	Barge	1920	1920	15,750	6-30-61	XX	$2,500	XX		
Trinity	Barge	1920	1920	17,000	6-30-61		2,500			
George E.	Barge	1920	1920	17,000	6-30-61		2,500			
Providence	Barge	1920	1920	17,000	6-30-61		2,500			
Ann Mc	Barge	1920	1920	15,000	6-30-61	XX	$2,500	XX		
L. J. Cobb	Barge	1920	1920	17,000	6-30-61		2,500			
Brooklyn	Barge	1920	1920	14,000	6-30-61		2,500			
Ann Jackson	Barge	1920	UNK	15,000	1961*	UNK	$2,500	XX		
Betty	Barge	1920	UNK	15,000	1961*	UNK	$2,500	XX		
Bella	Barge	1920	UNK	15,000	1961*	UNK	$2,500	XX		

* After destruction by fire.

** Sank in Gulf of Mexico.

RANGE TRANSPORT CO.

Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds derived on Disposition	Age at Date of Trial of this case	Normal Depth of Vessel	Reference in Trial Record as to Source of Data
Mary Edna	Tug	1920	1920	$45,000.00					P. Dis. 4	
Helen M.	Tug	1920	1920	45,000.00						
	Boat								G. Dis. 5, 6	
Mallard III	Barge	1920	1920	8,000.00	6-30-61	Unknown	Unknown	XX		Pets. 45
Ornette	Barge	1920	1920	21,000.00	6-30-61		15,000			
Boulder	Barge	1920	1920	21,000.00	6-30-61		15,000			
Denver	Barge	1920	1920	21,000.00	1st half 1961*	XX	*****	XX		
Wichita	Barge	1920	1920	21,000.00	*****		*****			
Casper	Barge	1920	1920	21,000.00	*****		*****			

* Boat traded in on another small boat.

** Abandoned.

panies' business grew, additional vessels were acquired by related business organizations and integrated into the two companies' fleet. (G. Exs. 7 & 8, pars. 29, 33, 34; Tr. 87-91, 840-41). The new vessels were controlled and dispatched by Edwards Transportation Co. and Barge Transport Co. (Tr. 852, 854, 91-93). The business organizations that owned the new vessels were paid monthly (based on time and distance factors) by Edwards Transportation Co. and Barge Transport Co. for use of the equipment (Tr. 94, 464-466, 858-859).

7. Thus, it was that Wilkins Barge Line, Ltd., was organized on February 16, 1944. (Tr. 87-92). This partnership during the years before the Court was owned two-thirds by Keith Edwards and one-third by a man named Wilkins. (G. Exs. 7 & 8, pars. 6). The Barge Delta Joint Venture was organized March 7, 1951, with C. W. Edwards as a 50 percent and Delaware Trading Co. (a party not otherwise involved) as the other 50 percent partner. (G. Exs. 7 & 8, pars. 5). Next, Louisiana Transporation Co. was organized on January 1, 1952; during the years before the Court that partnership (which was renamed Oil Cities Transportation Co. in August 1959), had nine partners, the interests of which are set out in the margin.[4]

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[4]

Name of Partner	Percentage of Partnership Interest
C. W. Edwards	69.131
J. E. Redding	5.217
E. L. Meley, Jr.	5.217
G. C. Linsmier	4.348
L. Z. Walker	4.348
J. E. Redding, Trustee (On August 1, 1959 this interest was conveyed to Inez Weaver)	3.478
C. W. Byrne, Jr.	3.043
M. H. Hoffman	2.609
W. N. Blair	2.609

(G. Exs. 7 & 8, pars. 1, 39). Finally January 18, 1952, another partnership, Buffalo Bayou Transportation Co. was organized; during the years before the Court this organization had five partners, data with respect to which is set out in the margin.[5] (G. Exs. 7 or 8, pars.4).

8. Data with respect to all of the vessels owned by the four organizations mentioned in the previous paragraph (from their inception) are as follows:

[Chart on page 85,135.]

9. The business of Edwards Transportation Co. and Barge Transport Co. continued to grow and during the middle and late 1950's there was a need to add additional vessels to the fleet. (Tr. 58). Nineteen new vessels (5 tugs and pushboats and 14 barges) were acquired and placed into operation between 1955 and the end of 1959. These new vessels, as were the vessels before them, operated on a "dispatch" basis through either Edwards Transportation Co. or Barge Transport Co., the two original organizations. (Tr. 836-37, 842, 852, 854-55). The nineteen new vessels were acquired in nineteen different business organizations, one partnership, and eighteen corporations.

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[5] The partners in Buffalo Bayou Transportation Co. in the years before the Court are as follow:

Name of Partner	Percentage of Partnership Interest
Keith S. Edwards	50
R. E. Wilkins	23
J. E. Gough	18
Herbert S. Fisher, Trustee	5
David Ruffin	4

On September 30, 1961, Ruffin sold his 4 percent to Keith S. Edwards.

10. Data as to the nineteen vessels acquired during 1955 through 1960 are as follows:

[Chart on page 85,136.]

* * *

12. The vessels in the Edwards fleet are used basically in four different bodies of water: (1) offshore in the Gulf of Mexico which is deep salt water; (2) the Mississippi River around New Orleans which is deep fresh water; (3) the Intracoastal Waterway which is relatively shallow, and at places brackish, salt and fresh water; and (4) the bayous, marshes and private canals in the Louisiana Gulf Coast area which are shallow and brackish and salt water. (E.g., Tr. 915).

13. Gradually, as the Edwards fleet expanded, Edwards Transportation Co. and Barge Transport Co. contracted with numerous oil operators and producers to perform the same services originally performed for Helis. Their services entail transporting petroleum products from field gathering points to refineries. The field gathering points are located in various swamp areas in south Louisiana, and the offshore wells are off the Texas and Louisiana coast. From the gathering points, the vessels would proceed to points of discharge, using in [94] most instances the Intracoastal Waterway, Houston Ship Channel, and the Mississippi River. As the vessels proceeded through the various bodies of water they were subjected to the various physical conditions present, such as shallow channels, etc.

* * *

Name of Owner	Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Previously Reserved on Disposition	Age at Date of Close of Taxable Year	Notional Limit of Vessel	Reference to Text Reserved as to Source of Data
Willits Barge Line, Ltd.	Betty	Barge	1945	2/26/46	$ 13,335.44				22	R	R
	Jimmie T.	Tug	1944	2/26/46	13,335.44				23	R	R
	Reed W.	Tug	1944	2/26/46	13,335.44	6/15/67	23		23	R	R
Barge Delta Joint Venture	Delta	Barge	1945	7/1/66	15,417.50				21	R	R
Louisiana Transportation Co.	C. T. & J.	Tug	1944	1/1/66	67,200.00				22	R	R
	Paul Ann	Tug	1944	1/1/66	67,200.00				22	R	R
Louisiana Transportation Co.	Aimee	Barge	1944	1/1/66	7,700.57				22	R	R
	Allen	Barge	1944	1/1/66	7,700.57				22	R	R
	D'Arbonne	Barge	1944	1/1/66	7,700.57				22	R	R
	Perkins	Barge	1944	1/1/66	7,700.57				22	R	R
	Tibbs	Barge	1944	1/1/66	7,700.57	6/67	23		23	R	R
Bubbs Barge Transportation Co.	Prudence	Barge	1945	1/1/66	120,813.84				21	R	R
	Reliance	Barge	1945	1/1/66	121,772.34				21	R	R

* Upon liquidation of partnership on 6/15/67, vessels transferred to Keith Rivards who still owns them.
** Upon liquidation of partnership on 6/67, vessel transferred to Keith Rivards who still owns them.
*** Vessel transferred to Rivards Transportation Co. (Canada) during 1966.
**** Vessel transferred to Bay Sound Transportation Co. (Canada) during 1966.
* This vessel was destroyed by fire and the proceeds represent salvage value.

Name of Owner	Date Owner Organized	Name of Vessel	Type Vessel	Date Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds rec'd on disposition	Age at Date of Final date of lease	Normal Draft of Vessel	Reference in Trial Record as to Source of Data
Gulf Storage Co., Inc. (a corporation)	10/20/25	Porpoise	Barge	10/ 1/25	$ 54,479.20	6/15/45	10	$21,000	..	8 ' 7 6 8	C. Exs. pars. 27 & 77 P. Ex. 4
Coastal Transportation Co. (a corporation)	12/30/25	Otter	Barge	3/30/26	82,600.00	.....	.....	.....	10	11 ' ..	11 & 40 ..
Ev Barge Co. (a corporation)	1/11/26	Ev	Barge	2/ 1/26	75,703.51	.....	.....	.....	10	11 ' ..	25 & 75 ..
Jack Barge Co. (a corporation)	4/20/26	Jack	Barge	10/ 1/26	60,367.70	.....	.....	.....	10	11 ' ..	26 & 76 ..
Wolverine Barge Co. (a corporation)	8/10/26	Wolverine	Barge	11/ 1/26	88,600.00	.....	.....	.....	10	11 ' ..	18 & 62 ..
Christine Towing Co. (a corporation)	7/ 9/27	Christine	Pushboat	8/ 1/27	67,700.00	.....	.....	.....	9	5 ' ..	10 & 46 ..
Sterling Barge Co. (a partnership) [1]	12/10/27	Lelia C.	Pushboat	1/ 5/28	225,142.26	.....	.....	.....	8	9½' ..	2 & 40 ..
Michigan Barge Co. (a corporation)	3/28/28	Michigan	Barge	4/ 2/28	48,500.03	.....	.....	.....	8	9 ' ..	19 & 63 ..
Erie Barge Co. (a corporation)	3/28/28	Erie	Barge	4/20/28	48,500.00	.....	.....	.....	8	9 ' ..	20 & 66 ..
Huron Barge Co. (a corporation)	3/28/28	Huron	Barge	4/10/28	48,500.00	.....	.....	.....	8	9 ' ..	21 & 67 ..
Superior Barge Co. (a corporation)	3/28/28	Superior	Barge	4/ 2/28	48,500.00	.....	.....	.....	8	9 ' ..	22 & 70 ..
Ontario Barge Co. (a corporation)	9/15/28	Ontario	Barge	10/ 1/28	39,865.97	.....	.....	.....	8	9 ' ..	23 & 71 ..
St. Clair Barge Co. (a corporation)	9/15/28	St. Clair	Barge	10/ 1/28	39,865.97	.....	.....	.....	8	9 ' ..	24 & 72 ..
Larsen Barge Co. (a corporation)	12/20/28	Larsen	Barge	1/12/29	61,158.30	.....	.....	.....	7	9 ' ..	15 & 58 ..
Naples Barge Co. (a corporation)	1/16/29	Naples	Barge	2/ 1/29	88,565.98	.....	.....	.....	8	11 ' ..	16 & 59 ..
Navidad Barge Co. (a corporation)	12/20/28	Navidad	Barge	1/12/29	61,158.30	.....	.....	.....	7	9 ' ..	17 & 60 ..
Green Bay Transportation Co. (a corporation)	3/27/29	Green Bay	Tug	4/ 1/29	60,261.52	.....	.....	.....	7	6 ' ..	14 & 54 ..
Murray Bay Transportation Co. (a corporation)	7/13/29	Murray Bay	Tug	9/ 1/29	85,662.26	.....	.....	.....	7	9½' ..	13 & 52 ..
Dixon Bay Transportation Co. (a corporation)	7/13/29	Dixon Bay	Pushboat	9/ 1/29	85,667.71	.....	.....	.....	7	9½' ..	12 & 50 ..

All of the foregoing vessels were built of steel and of conventional design. (Tr. 702, 1214, 139 4, 1404, 1408, 1488, 1463, 1478).

[1] The partners are Keith S. Edwards and C. W. Edwards.

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18. The Edwards fleet's barges have never been manned; crews, of course, man the various boats and are present on the barges that are in the boat's tow. During the 1930's and 1940's members of the boat's crews worked, in their spare time, scraping and repainting the exposed surfaces of the barges and boats on which they worked. With the passage of years, this practice has decreased due primarily to the reduction (brought about in a desire to reduce costs) in the number of men on the boats. * * * (Tr. 856).

19. Edwards Transportation Co. has been extremely profitable through the years. During 1958 and 1959 Mr. C. W. Edwards' 50 percent distributive portion of Edwards Transportation Co. produced for him respectively $72,157 and $93,811. (G. Exs. 7 & 8 pars. 78). Louisiana Transportation Co., the partnership, has also been extremely lucrative for Mr. Edwards through the years, and during 1958 and 1959 it produced, for his 69 percent interest, distributive shares of $262,962 and $367,909, respectively. (G. Exs. 7 & 8, pars. 78). Sterling barge line, the partnership which operated the Edwards fleet's most expensive vessel (the Letha C., which cost $325,000) generated for Mr. Edwards' 50 percent interest $24,136 and $39,323 during 1958 and 1959. (G. Exs. 7 & 8, pars. 78). Mr. Edwards' personal income tax bracket was in excess of 90 percent during the years involved. (Tr. 204). Mr. Edwards personally received ¼ of a cent per barrel for all crude oil or distillate transported.

20. The following table reflects, by year, from date of vessel acquisition the (1) total revenue earned (net of amounts paid out for chartered equipment and vessels); (2) amounts currently deducted by the owners as repairs and maintenance expense (even though such items including replacing vessels' sides, bottoms, knuckles, etc.); and (3) taxable income produced by vessel:

Year ending during	Edwards Transportation Co. (18 vessels) Revenue *	Repairs	Taxable Income *	Record Reference	Barge Transportation Co. (7 vessels) Revenue *	Repairs *	Taxable Income	Record Reference
1951		.....		P. Ex. 14			$69,012	P. Ex. 6, p. 3
1952		$ 38,362		P. Ex. 14			52,189	P. Ex. 6, p. 3
1953		59,676		P. Ex. 14			72,476	P. Ex. 6, p. 3
1954		91,257		P. Ex. 14			37,494	P. Ex. 6, p. 3
1955		90,084		P. Ex. 14			41,897	P. Ex. 6, p. 3
1956		41,888		P. Ex. 14			66,955	P. Ex. 6, p. 3
1957		98,640		P. Ex. 14			95,835	P. Ex. 6, p. 3
1958		94,524		P. Ex. 14			48,633	P. Ex. 6, p. 3
1959		93,785		P. Ex. 14			65,471	P. Ex. 6, p. 3
1960		78,987		P. Ex. 14			41,997	P. Ex. 6, p. 3
1961		85,452		P. Ex. 14			85,963	P. Ex. 6, p. 3
1962		135,391		P. Ex. 14			44,533	P. Ex. 6, p. 3
1963		62,579		P. Ex. 14			43,870	P. Ex. 6, p. 3
1964		78,949		P. Ex. 14			97,813	P. Ex. 6, p. 3
1965		71,709		P. Ex. 14			.....	P. Ex. 6, p. 3
1966		82,459		P. Ex. 14			.....	P. Ex. 6, p. 3

* Data not furnished despite service of interrogatories by the Government.

Year Ending During	Wilkins Barge Line (partnership) Barge Betty ** Revenue	Repairs	Taxable Income	Tug Hazel W.** Revenue	Repairs	Taxable Income	Barge Jimmy T.** Revenue	Repairs	Taxable Income	Record Reference
1951	$48,853	$2,574	*	$48,853	$2,574	*	$48,853	$2,574	*	P. Ex. 5, pp. A-20-22
1952	52,381	3,463	*	52,381	3,467	*	52,381	3,463	*	P. Ex. 5, pp. A-20-22
1953	50,140	5,955	*	50,140	5,955	*	50,140	5,955	*	P. Ex. 5, pp. A-20-22
1954	46,088	1,377	*	46,088	1,377	*	46,084	1,377	*	P. Ex. 5, pp. A-20-22
1955	38,220	1,116	*	38,220	1,116	*	38,220	1,116	*	P. Ex. 5, pp. A-20-22
1956	39,220	4,726	*	39,220	4,726	*	39,220	4,726	*	P. Ex. 5, pp. A-20-22
1957	46,753	5,486	*	46,753	5,486	*	46,753	5,486	*	P. Ex. 5, pp. A-20-22
1958	43,275	3,045	*	43,275	3,045	*	43,275	3,045	*	P. Ex. 5, pp. A-20-22
1959	39,913	2,615	*	39,913	2,615	*	39,913	2,615	*	P. Ex. 5, pp. A-20-22
1960	40,487	715	*	40,487	715	*	40,487	715	*	P. Ex. 5, pp. A-20-22
1961	40,388	2,336	*	40,388	2,336	*	40,388	2,336	*	P. Ex. 5, pp. A-20-22
1962	40,230	637	*	40,230	637	*	40,230	637	*	P. Ex. 5, pp. A-20-22
1963	34,476	7,367	*	34,476	7,367	*	34,476	7,367	*	P. Ex. 5, pp. A-20-22
1964	12,362	164	*	12,362	164	*	12,362	164	*	P. Ex. 5, pp. A-20-22
1965										
1966										

* Data not furnished despite service of interrogatories by the Government.
** Total figures are allocated one-third to each vessel.

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Year Ending During	Buffalo Bayou Transportation Barge Butane & Propane Revenue	Repairs	Taxable Income	Record Reference	Bay Sound Transportation Company C. T. & J.—Tug ** Revenue	Repairs	Taxable Income	Record Reference
1951	.....	.....	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1952	$ 28,000	$ 331	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1953	119,400	880	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1954	75,979	—0—	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1955	88,980	—0—	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1956	60,720	880	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1957	65,320	2,177	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1958	53,147	1,373	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1959	52,320	320	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1960	52,320	1,321	*	P. Ex. 5, p. A-23	$48,282	$ 708	$34,575	P. Ex. 5, p. A-10;
1961	52,320	37,626	*	P. Ex. 5, p. A-23	77,724	4,210	39,459	P. Ex. 6, p. 1; Ex.
1962	52,320	1,321	*	P. Ex. 5, p. A-23	72,241	4,446	37,988	6-A to D, Ex. 15;
1963	48,320	6,000	*	P. Ex. 5, p. A-23	72,720	2,313	33,289	P. Ex. 4, p. 18.
1964	24,776	2,320	*	P. Ex. 5, p. A-23	60,126	2,320	28,000	
1965	*	*	*	P. Ex. 5, p. A-23	60,000	2,324	24,450	
1966	*	*	*	P. Ex. 5, p. A-23	94,000	615	31,000	

* Data not furnished despite service of interrogatories by the Government.
** Owned during the first three years of its operation by Louisiana Transportation Co., and during the balance of the time by Bay Sound Transportation Co.

Year Ending During	Barge Delta-Joint Venture Barge Delta Revenue	Repairs	Taxable Income	Record Reference	Riverside Transportation Co. Pushboat Toni Ann ** Revenue	Repairs	Taxable Income	Record Reference
1951	*	*	*	P. Ex. 5, p. A-24	.....	.....	.....	
1952	$ 8,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1953	9,000	$ 35	*	P. Ex. 5, p. A-24	.....	.....	.....	
1954	11,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1955	10,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1956	10,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1957	10,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1958	10,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	
1959	9,000	—0—	*	P. Ex. 5, p. A-24	$ 48,588	$ 2,060	$27,371	P. Ex. 5, p. A-25;
1960	7,000	2,021	*	P. Ex. 5, p. A-24	228,420	13,200	47,400	P. Ex. 6, p. 1;
1961	7,000	—0—	*	P. Ex. 5, p. A-24	90,004	13,207	25,701	Ex. 6-A to D, Ex.
1962	7,000	73	*	P. Ex. 5, p. A-24	88,201	24,200	25,050	15; P. Ex. 4, p. 18
1963	7,000	2,200	*	P. Ex. 5, p. A-24	64,814	10,000	23,244	
1964	7,000	600	*	P. Ex. 5, p. A-24	82,000	6,710	24,972	
1965	4,000	57	*	P. Ex. 5, p. A-24	81,200	12,400	14,200	
1966	*	*	*	P. Ex. 5, p. A-24	*	*	*	

* Data not furnished despite service of interrogatories by the Government.
** Operated during 1959-60 by Louisiana Transportation Co.

Louisiana Transportation Co. (Later known as Oil Cities Transportation Co.)

Year Ending Dec.	Tug Arnold			Tug Alice			Tug C. T. S. J.**			Tug D'Artagnan		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1935	$ 81,252	$1,200		$ 75,000	$2,897					$ 74,647	$1,000	
1936	83,775	1,000		80,000	3,000					76,000	1,000	
1937	85,000	1,000		85,000	3,000					77,500	1,000	
1938	84,000	1,000		150,000	3,000					78,000	1,000	
1939	84,000	1,000		160,000	7,000		$100,000	$1,000		12,000	1,000	
1940	78,000	1,000		144,000	7,000		95,000	2,000		11,000	1,000	
1941	80,000	1,000		147,000	30,000		97,500	2,000		12,000	1,000	
1942	87,000	1,000		150,000	7,000					12,000	1,000	
1943	87,000	1,000		150,000	7,000					12,000	1,000	
1944	74,000	1,000		160,000	7,000					12,000	1,000	
1945	82,000	1,000		80,000	3,000					10,000	1,000	
1946	82,000	1,000		80,000	3,000					10,000	1,000	
1947										10,000	1,000	
1948										10,000	1,000	
1949										10,000	1,000	
1950										10,000	1,000	
1951										10,000	1,000	
1952										10,000	1,000	
1953										10,000	1,000	
1954										10,000	1,000	
1955										10,000	1,000	
1956										10,000	1,000	
1957										10,000	1,000	
1958										10,000	1,000	
1959										10,000	1,000	
1960										10,000	1,000	
1961										10,000	1,000	
1962										10,000	1,000	
1963										10,000	1,000	
1964										10,000	1,000	
1965										10,000	1,000	

Year Ending Dec.	Tug Perkins			Tug Tilda			Publicist Test Ass'n ***			Record Reference
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	P. Ex. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44—45; Ex. 2 to D; Ex. 29
1935	$ 80,000	$2,000		$ 65,000	$2,271					
1936	85,000	1,500		80,000	2,000					
1937	85,000	1,500		75,000	2,000					
1938	85,000	1,500		85,000	2,000					
1939	85,000	1,500		75,000	2,000					
1940	85,000	1,500		85,000	2,000		$ 72,000	$2,000		
1941	85,000	1,500		85,000	2,000		276,000	6,000		
1942	85,000	1,500		87,000	2,000					
1943	85,000	1,500		87,000	2,000					
1944	85,000	1,500		85,000	2,000					
1945	85,000	1,500								
1946	85,000	1,500								

* Data not furnished despite service of interrogatories by the Government. During the fiscal years ending in 1939 and 1940 the partnership's net profit was respectively $977.70 and $66,626. (P. Exs. 43 and 44).

** Owned during the first three years of operation by Louisiana Transportation Co. and during the balance of the time by Bay Sound Transportation Co.

*** Owned during the first three years of its operation by Louisiana Transportation Co. and during the balance of the time by Riverside Transportation Co.

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Year Ending Dec.	Christine Towing Co.*			Dixon Bay Transportation Co. **			Erie Barge Co.***			Er Barge Co.****		
	Pushboat Christine			Pushboat Dixon Bay			Barge Erie			Barge Er		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1959	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1960	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1961	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1962	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1963	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1964	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1965	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1966	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

* The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 4, p. A-11; P. Ex. 4, p. A-12; P. Ex. 4, p. A-13; P. Ex. 4, p. A-14; P. Ex. 4, p. A-15; P. Ex. 4, p. A-16; P. Ex. 4, p. A-17; P. Ex. 4, p. A-18; P. Ex. 4, p. A-19; P. Ex. 4, p. A-20; P. Ex. 4, p. A-21; P. Ex. 4, p. A-22; P. Ex. 4, p. A-23; P. Ex. 4, p. A-24; P. Ex. 4, p. A-25.

** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 5, p. A-11; P. Ex. 5, p. A-12; P. Ex. 5, p. A-13; P. Ex. 5, p. A-14; P. Ex. 5, p. A-15; P. Ex. 5, p. A-16; P. Ex. 5, p. A-17; P. Ex. 5, p. A-18; P. Ex. 5, p. A-19; P. Ex. 5, p. A-20; P. Ex. 5, p. A-21; P. Ex. 5, p. A-22; P. Ex. 5, p. A-23; P. Ex. 5, p. A-24; P. Ex. 5, p. A-25.

*** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 6, p. A-11; P. Ex. 6, p. A-12; P. Ex. 6, p. A-13; P. Ex. 6, p. A-14; P. Ex. 6, p. A-15; P. Ex. 6, p. A-16; P. Ex. 6, p. A-17; P. Ex. 6, p. A-18; P. Ex. 6, p. A-19; P. Ex. 6, p. A-20; P. Ex. 6, p. A-21; P. Ex. 6, p. A-22; P. Ex. 6, p. A-23; P. Ex. 6, p. A-24; P. Ex. 6, p. A-25.

**** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 7, p. A-11; P. Ex. 7, p. A-12; P. Ex. 7, p. A-13; P. Ex. 7, p. A-14; P. Ex. 7, p. A-15; P. Ex. 7, p. A-16; P. Ex. 7, p. A-17; P. Ex. 7, p. A-18; P. Ex. 7, p. A-19; P. Ex. 7, p. A-20; P. Ex. 7, p. A-21; P. Ex. 7, p. A-22; P. Ex. 7, p. A-23; P. Ex. 7, p. A-24; P. Ex. 7, p. A-25.

Year Ending During	Green Bay Transportation Co.** Tug Green Bay Revenue	Repairs	Taxable Income	Huron Barge Co.*** Barge Huron Revenue	Repairs	Taxable Income	Jack Barge Co.**** Barge Jack Revenue	Repairs	Taxable Income	Lemon Barge Co.***** Barge Lemon Revenue	Repairs	Taxable Income
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1959	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1960	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1961	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1962	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1963	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1964	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1965	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1966	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

* Data not furnished despite service of interrogatories by the Government.
** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-45; P. Ex. 4, p. 1; Ex. O-4 to D. Ex. 15; Ex. 4, p. 18.
*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-46; P. Ex. 4, p. 2; Ex. O-4 to D. Ex. 15; P. Ex. 4, p. 18.
**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-46; P. Ex. 4, p. 3; Ex. O-4 to D. Ex. 15; P. Ex. 4, p. 18.
***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-46; P. Ex. 4, p. 1; Ex. O-4 to D. Ex. 15; P. Ex. 4, p. 19

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Year Ending During	Sterling Barge Line ** Pushboat Letha C. Edwards Revenue	Repairs	Taxable Income	Michigan Barge Co.*** Barge Michigan Revenue	Repairs	Taxable Income	Murray Bay Transportation Co.**** Pushboat Murray Bay Revenue	Repairs	Taxable Income	Hapthe Barge Co.***** Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	$305,000	$17,535	$48,271	.....	.....	.....	.....	.....	.....	$38,500	$ 535	$ 7,804
1959	278,572	27,091	78,645	$11,000	—0—	$(5,450)	.....	.....	.....	35,640	197	18,612
1960	268,307	21,414	97,424	13,000	—0—	(1,538)	$64,300	$ 1,472	$25,650	35,640	135	21,615
1961	270,675	20,702	75,675	13,000	—0—	—0—	101,189	3,151	34,620	35,640	288	25,201
1962	257,177	12,037	80,726	13,000	—0—	—0—	88,941	6,573	27,088	35,640	—0—	26,088
1963	241,085	6,799	63,760	13,000	$ 0	4,688	88,660	11,720	28,127	30,000	1,714	20,666
1964	214,615	15,163	58,988	9,520	11,920	(6,949)	87,047	6,943	22,762	24,122	25,977	(7,683)
1965	261,963	28,388	89,585	12,000	202	6,075	92,658	11,394	16,088	26,621	276	17,889
1966	*	*	*	9,850	208	6,762	79,277	11,080	4,574	*	*	*

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 6, p. A-9; Ex. O-8 to D. Ex. 15; P. Ex. 4, p. 18.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 6, p. A-17; P. Ex. 6, p. 2; Ex. O-7 to D. Ex. 15, P. Ex. 4, p. 19.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 6, p. A-14; P. Ex. 6, p. 1; Ex. O-6 to D. Ex. 15; P. Ex. 4, p. 18.

***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 15; P. Ex. 4, p. 20.

Year Ending During	Navidad Barge Co. **			Ontario Barge Co. ***			Coastal Transportation Co. ****			Gulf Storage Co. *****		
	Barge Navidad			Barge Ontario			Barge Otter			Barge Perpino		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	$24,375	$ 600	($1,000)	$11,000	$4,000	($7,500)
1957	.....	.....	.....	.....	.....	.....	25,000	600	1,977	15,000	7,000	(1,500)
1958	.....	.....	.....	.....	.....	.....	25,000	11,771	10,500	15,000	†	5,000
1959	.....	$15,774	($2,870)	$14,500	†	($1,397)	25,000	†	13,333	15,000	†	7,000
1960	.....	15,000	3,439	14,500	†	250	25,000	†	9,000	15,000	†	5,000
1961	.....	15,000	5,000	14,500	†	2,000	25,000	†	7,000	15,000	†	4,000
1962	.....	15,000	11,000	14,500	†	2,000	25,000	†	11,000	15,000	†	4,000
1963	.....	15,000	13,913	14,500	0	13,000	25,000	†	11,000	15,000	†	4,000
1964	.....	12,457	4,119	15,000	10,707	1,340	25,000	†	11,000	15,000	†	4,000
1965	.....	16,000	11,300	15,000	1,382	13,470	25,000	8,000	11,700	15,000	†	4,000
1966	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 13; P. Ex. 4, p. 12.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 21; P. Ex. 4, p. 12.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-18; P. Ex. 6, p. 3; Ex. O-10 to D. Ex. 14; P. Ex. 4, p. 13.

***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 4, p. A-16; P. Ex. 6, p. 3; P. Ex. 4, p. 10; Ex. O-9 to D. Ex. 15.

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Year Ending During	St. Clair Barge Co.*			Superior Barge Co.**			Wolverine Barge Co.***			
	Barge St. Clair			Barge Superior			Barge Wolverine			
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	.....	.....	($8,397)	$11,000	—0—	($8,397)	$27,616	$ 4,368	($8,168)
1959	$14,546	—0—	302	13,000	—0—	(1,168)	24,888	12,048	(1,252)
1960	16,500	—0—	8,254	13,000	—0—	7,832	25,000	214	7,888
1961	16,500	—0—	9,713	13,000	118	8,714	15,000	213	8,477
1962	16,500	117	11,888	12,000	13	(1,888)	15,000	—0—	9,877
1963	16,087	11	13,272	10,064	7,824	7,824	15,000	191	11,888
1964	15,211	2,628	11,000	12,000	1,776	(1,888)	15,000	4,176	8,419
1965	*	*	*	9,000	288	4,888	*	*	*

* Data not furnished despite service of interrogatories by the Government.
** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 6, p. A-17; P. Ex. 6, p. 3; Ex. O-10 to D. Ex. 15; P. Ex. 4, p. 15.
*** The tabulated figures pertaining to this company are derived from information contained in the following record references; P. Ex. 6, p. A-18; P. Ex. 6, p. 2; Ex. O-11 to D. Ex. 15; P. Ex.-4, p. 15.
**** The tabulated figures pertaining to this company are derived from information contained in the following record references; P. Ex. 6, p. A-18; P. Ex. 6, p. 3; Ex. O-11 to D. Ex. 15; P. Ex. 4, p. 15.

* * *

As to the multiple corporation issue:

22. Barge Transport Co., the orginal corporation in the group of corporations involved in this case, was organized and has operated since 1939. The shareholders of this corporation at all times pertinent to this case were:

(1) Keith Edwards, plantiff in Civil Action No.63-H-95, the only child of Mr. C. W. Edwards; Keith Edwards was 40 years old when this case was tried. (Tr. 1371, 1384).

(2) John E. Reddng, plantiff in Civil Action No. 63-H-96, who functions as the general manager of the whole group of companies. (Tr. 789).

(3) Miss Pauline Lambert; Miss Lambert ceased to be a shareholder on November 16, 1960, when the corporation redeemed her stock; she is C. W. Edwards' sister. (G. Exs 9 and 10, pars. 10).

(4) Mrs. Letha C. Edwards, one of the plaintiffs in Civil Action No. 63-H-94, who is the wife of Mr. C. W. Edwards. (G. Exs.9 and 10, pars. 10).

(5) Mrs. Evelyn Owens Edwards; Mrs. Edwards is a sister-in-law of C. W. Edwards. (D. Exs 9 and 10. pars. 10). (G. Exs.7 and 8 pars. 7).

23. The officers of Barge Transport Co., at all times here relevant were Keith Edwards, President, Charles W. Edwards, Vice-President; and Jack Redding, Secretary and Treasurer. The same three men formed the Board of Directors of the corporation at all times here pertinent. (P. Ex. 4, p. 23).

24. The stock of Bay Sound Transportation Co., the corporation organized August 1, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	67.131	$ 772.00
J. E. Redding	5.217	60.00
Edwards' Employees	27.652	318.00
		$1,150.00

Bay Sound Transportation Co. and C. W. Edwards has options to acquire the stock owned by the employees (and Mr. Redding). (G. Exs. 7 & 8, Pars. Tr. 643-645, 844, 975, 1294-95; P. Ex. 8L).

25. Riverside Transportation Co., the corporation organized August 1, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	67.131	$ 772.00
J. E. Redding	5.217	60.00
Edwards' Employees	27.652	318.00
		$1,150.00

Riverside Transport and C. W. Edwards had options to acquire the stock owned by the employees and Mr. Redding. (G. Exs. 7 and 8, Pars. 9; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8Q).

26. Christine Towing Co., the corporation organized July 9, 1957, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
Keith Edwards	98	$ 980.00
J. A. Hendricks (an Employee of Edwards Transportation Co. and Barge Transport Co.)	1	10.00
C. W. Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 10; Tr. 1294-95; P. Ex. 8A).

27. Coastal Transportation Co., the corporation organized December 20, 1955, at all times pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	50	$ 500.00
C. W. Edwards	21	210.00
Keith Edwards	25	250.00
J. E. Redding	4	40.00
		$1,000.00

Coastal Transportation Co. and C. W. Edwards had options to acquire the stock owned by Messrs. Redding and Gough. G. Exs. 7 and 8, pars. 11; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8R).

28. Dixon Bay Transportation Co., and Murray Bay Transportation Co., the corporations organized July 13, 1959, at all times here pertinent were owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
G. W. Edwards	41.5	$ 477.25
Keith S. Edwards	41.5	477.25
J. E. Redding	3	34.50
Edwards' employees	14	161.00
		$1,150.00

(G. Exs. 7 and 8, Pars. 12 and 13; Tr. 1294-95; P. Exs. 8M and 8P).

29. Green Bay Transportation Co., the corporation organized March 27, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	73	$ 730.00
Keith S. Edwards	10	100.00
J. E. Redding	3	30.00
Employees of Edwards Transportation Co. and/or Barge Transport Co.	14	140.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 14; Tr. 1294-95; P. Ex. 8N).

30. Lavaca Barge Co., the corporation organized December 29, 1958, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	98	$ 980.00
Letha C. Edwards	1	10.00
Keith C. Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8 Pars. 15; Tr. 1294-95; P. Ex 8GG).

31. Naptha Barge Co., the corporation organized December 31, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
Keith S. Edwards....	99.8	$ 998.00
C. W. Edwards	.1	1.00
J. A. Hendricks (an employee of Edwards Transportation Co. and Barge Transport Co.)	.1	1.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 16; Tr. 1294-95; P. Ex. 8KK).

32. Navidad Barge Co., the corporation organized December 29, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	98	$ 980.00
Letha C. Edwards	1	10.00
Keith Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 17; Tr. 1294-95; P. Ex. 8MM).

33. Wolverine Barge Co., the corporation organized August 16, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	50	$ 500.00
Keith Edwards	49	490.00
C. W. Edwards	1	10.00
		$1,000.00

Wolverine Barge Co. and C. W. Edwards had an option to acquire Mr. Gough's stock in Wolverine Barge Co. (G. Exs. 7 and 8, Pars. 18; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8XX).

34. Michigan Barge Co., Erie Barge Co., Huron Barge Co., and Superior Barge Co., which corporations were all organized March 25, 1958, at all times here pertinent, were owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	40	$ 400.00
H. V. Huckaby (Mr. Gough's employee)	5	50.00
T. H. Bryant (Mr. Gough's employee)	5	50.00
Louisiana Transportation Co.[8]	50	500.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 19, 22; Tr. 1294-95; P. Exs. 8V, 8CC, 811 8SS).

35. Michigan Barge Co., Erie Barge Co., Huron Barge Co., and Superior Barge Co., respectively, had options to acquire the stock owned in each corporation by Messrs. Gough, Huckaby, and Bryant; C. W. Edwards also had option to acquire the stock in the foregoing four corporations owned by Messrs. Gough, Huckaby and Bryant. (Tr. 643-45, 844, 975).

36. Ontario Barge Co., the corporation organized September 15, 1958, at all times here pertinent, was owned as follows:

[8] As is indicated in paragraph 7, *supra*, the partners in Louisiana Transportation Co., Ltd., are C. W. Edwards, 69.131%; Jack Redding, 5.217%; employees of Edwards Transportation Co. and/or Barge Transport Co., 27.652%. Louisiana Transportation Co. had options to acquire from Messrs. Gough, Huckaby and Bryant the interests they owned in Michigan Barge Co., Erie Barge Co., Huron Barge Co. and Superior Barge Co. (Tr. 844, 943-45, 975).

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5	50.00
Employees of Edwards Transportation Co. .	5	50.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 23; Tr. 1294-95; P. Ex. 800).

37. St. Clair Barge Co., the corporation organized September 15, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5	50.00
Employees of Edwards Transportation Co. .	5	50.00
		$,1000.00

(G. Exs. 7 & 8, Pars. 24; Tr. 1294-95; P. Ex. 8QQ).

38. Ev Barge Co., the corporation organized January 11, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5.5	55.00
Employees of Edwards Transportation Co.	4.5	45.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 25; Tr. 1294-95; P. Ex. 8Y).

39. Jack Barge Co., the corporation organized April 30, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5.5	55.00
Employees of Edwards Transportation Co.	4.5	45.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 26; Tr. 1294-95; P. Ex. 8EE).

40. Gulf Storage Co., the corporation organized October 20, 1955, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	80	$ 880.00
J. E. Redding	10	110.00
Employees of Edwards Transportation Co...	10	110.00
		$1,100.00

(G. Exs. 7 & 8, Pars. 27; Tr. 1294-95; P. Ex. 8AA).

41. Bay Sound Transportation Co. and Riverside Transportation Co., the corporations described in paragraphs 26 and 27, *supra*, acquired the vessels C. T. & J. and Toni Ann from the partnership Louisiana Transportation Co. at or about the time they were organized. (G. Exs. 7 & 8, Pars. 44, 46). The remaining eighteen corporations (described in pars. 28 through 42, *supra*) each acquired one new vessel at or about the time they were organized. (See Par. 10, *supra*).

42. Each of the eighteen new vessels acquired by eighteen corporations were acquired in essentially the same fashion. First, the decision to construct the vessel was made by Mr. C. W. Edwards, the Vice-President of the original corporation, Barge Transport Co. (Tr. 1369-70); this decision was made after counseling with Jack Redding, the general manager of the entire fleet, Ev Meley, the engineer for the entire fleet, Keith Edwards, Mr. Edwards' son, and Mr. Amiel Sumrow, the CPA who was the internal auditor and financial manager for all of the business. (Tr. 1369-70, 987-89, 925, 929, 480-81, 227). Once the decision to construct a vessel was made, an order for the construction of the vessel was placed. While

the vessel was under construction, and about the time for delivery thereof, Mr. Edwards would call upon either the Texas National Bank or the National Bank of Commerce in Houston to arrange for a loan to cover the full acquisition cost. (Tr. 1338-42, 1351-59). Most of the loans paid the entire total cost of the construction and, in many instances, provided additional funds for operating expenses. (*Ibid;* See Par. 10, *supra.**). Repayment of all the loans was guaranteed by C. W. Edwards. The banks, of course, were relying on his guarantee as well as the security offered by the value of the vessel, which was generally covered by a chattel mortgage. (Tr. 1352-60, 1367, 1338-45). Mr. Edwards never furnished the banks (nor did the banks request), financial data on himself or any of the eighteen corporations. (Tr. 1344-45, 1348, 1359-60). Mr. Edwards had had a long course dealing with these two banks and was well known and trusted as a responsible person. (Tr. 1273, 1360).

43. After the decision to construct each of the eighteen new vessels was made, and the order therefore was placed with the company doing the construction work, the corporation to receive the vessel when completed, was organized. (Tr. 1123-27). Whatever property rights that existed in the vessels under construction, were acquired by each of the eighteen new corporations and when and as the vessels were completed and delivered, the corporations took titles.** Then, the vessels were placed into service in the Edwards fleet.

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* For instance, the Barge Navidad cost $41,000 (see Par. 10, *supra*) but the loan on January 12, 1959, was $43,000. (Tr. 1356).

** Most of the vessels were delivered from a few days to a few weeks after the owner-corporation was organized. (See Par. 10, *supra*).

44. Of the twenty corporations organized between 1955 and 1960, 14 each owned one barge, and 6 each owned one boat. (G. Exs. 7 & 8, Pars. 37, 38, 44, 46, 48, 49, 50. 52, 54, 56, 58, 60, 62, 63, 65, 67, 69, 71, 73, 75, 76 and 77). None of the barge corporation had any employees. The only employees of the boat corporation other than members of the crews, are as follows:

Name of employee	Name of corporation-employer
Keith Edwards	Christine Towing Co.
J. A. Hendricks (maintenance)	Christine Towing Co.
Vera McNeilly (bookkeeper)	Green Bay Transporation

(Tr. 449-457; P. Ex. 4, pp. 24-42).

Messrs. Edwards and Hendricks were also employees of either Barge Transport Co. or Edwards Transportation Co. and they drew the bulk of their pay from these organizations. (P. Ex. 4, pp. 39-42). The administrative personnel for the organization were employed by either Edwards Transportation Co. or Barge Transport Co. (Tr. 459-75).

45. The operation of Edwards Transportation Co. and Barge Transport Co., the several partnerships that owned vessels (Wilkins Barge Line, Louisiana Transportation Co., Buffalo Bayou Transportation Co., Barge Delta Joint Venture, and Sterling Barge Line), and the twenty vessel-owning corporations was essentially as follows:

(a) All of the companies utilized the same office address. (G. Exs. 7 & 8, Pars. 34).

(b) Edwards Transportation Co. and Barge Transport Co. had telephone listings and were the only two com-

panies known (other than Wilkins Barge Line for a time) to the general public; these two companies obtained all business for the entire group of Edwards' companies. (G. Exs. 7 & 8, Pars. 33; Tr. 479-480, 765-67, 852).

(c) When Edwards Transportation Co. or Barge Transport Co. obtained a contract for the transportation of petroleum products, Mr. Redding was given the job of seeing that appropriate vessels were assigned to the job. Mr. Redding, of course, knew the capacity and capability of each of the vessels and would assign the appropriate number of barges and boats to the tasks. The company maintained a dispatching office in New Orleans and another in Houston, and contact was made with the boat captain to advise him what barges to pick up, where he should go, and what he should do. The dispatches in New Orleans and Houston and Mr. Redding were all employees of Edwards Transportation Co. and/or Barge Transport Co. (Tr. 111-114, 93, 791, 852-54).

(d) In those circumstances where the Edwards fleet had no vessels available to perform a contract, outsiders were contacted and a sub-contract was made with these outsiders to either furnish one or two barges or a tugboat or a whole tow, as necessary, for the job at hand. However, in dispatching the vessels to the job sites, preference was always given to vessels owned in the Edwards fleet, and about 90 percent of the work that was obtained through Edwards Transportation Co. and Barge Transport Co. was done by the Edwards fleet itself. (Tr. 479-80, 852-56).

(e) Of course, there were no formal negotiations or contracts let between Edwards Transportation Co. and/or Barge Transport Co. and the five partnerships and twenty vessel-owning corporations. Instead, the vessels were dis-

patched to perform the work, much like taxicabs are dispatched, and an intercompany billing process followed. Those corporations and partnerships which owned barges determine which boat corporations and partnerships used their barges during the particular month just past. Records covering this were maintained by either Edwards Transporation Co. or Barge Transport Co. Amounts to be collected from the boat corporations and partnership by all of the various barge corporations and parternerships were recorded on the books of the various barge corporations and partnerships as "accounts receivable". The amounts were then entered into the books of account of the boat corporations and partnerships as "accounts payable". Then the boat companies calculated the amounts "owed" them by either Edwards Transportation Co. or Barge Transport Co. for transportation services performed during the preceding month. Such amounts were recorded on the boat companies' books of account as "accounts receivable". (Tr. 458-473, 854-59).

(f) Barge Transport Co. and Edwards Transportation Co. recorded the boat companies' charges as "accounts payable". Barge Transport Co. and/or Edwards Transportation Co. would then bill the person for whom the services were performed, such as Texaco, Inc., Gulf Refining Co., etc. When the money covering the invoices was received by Edwards Transportation Co. and/or Barge Transport Co., they drew checks on their respective bank accounts to pay the boat companies; the boat companies deposited the checks and drew checks of their own in favor of the barge companies. All of this bookeeping work was accomplished in one office by five or six bookkeepers who were employees of Edwards Transportation Co. and/or Barge Transport Co. Books of accounts were

maintained for each of the twenty new corporations and, of course, bank accounts were maintained. (Tr. 458-473, 854-59).

(g) When a particular vessel needed repairs, the captain in control would proceed to either Edwards Transportation Co.'s shipyard in southern Louisiana, or to the closest shipyard. Contact would then be made with the Barge Transport Co. and/or Edwards Transportation Co.'s office in Houston or New Orleans for instructions. (Tr. 117-118). When the work was done, the bill was generally submitted by the company performing the work to Edwards Transportation Co.; the bill would be filtered into the hands of whichever organization owned the vessel on which the work was done, and an appropriate check was drawn to pay the debt. (Tr. 635-37, 723-24, 765-67). All of the tow boat crews were hired by the organization's personnel manager in New Orleans. (Tr. 473-75, 663).

(h) Both Edwards Transportation Co. and Barge Transport Co. paid the boat companies slightly less than the amounts they billed their customers. This generally amounted to a fraction of a cent per barrel of pertroleum products moved. Thus, Edwards Transportation Co. and Barge Transport Co. had revenues not only from the operations of their own barges and boats, but also from this "service charge" it made to the other partnerships and corporations in the group when their vessels were dispatched. (Tr. 62, 527).

46. All of the key personnel in the Edwards organization were informed of and aware of the potential tax advantage that could be accomplished by spreading income from one business over more than one corporation. They

were aware that, during the late 1950's, the federal income tax rate applicable to corporations was 30 percent on the first $25,000 of taxable income, and 52 percent on all taxable income in excess of $25,000. (Tr. 204-211, 435, 448-49, 490-91, 499, 504-505, 646, 846-849, 867-68, 1607-10). Mr. Sumrow, the C. P. A.-employee of Edwards Transportation Co., discussed the potential tax advantage that could be achieved by splitting the Edwards business into several corporations with Mr. Edwards, Mr. Jack Redding, and Mr. Meley, all of whom were the managerial personnel in the organization. (Tr. 441-449, 480-500, 504-05). There were discussion among the key personnel during 1955 and 1956 (contemporaneously with the organization of the first of the twenty corporations that were organized between 1955 and 1960) pertinent to the tax advantages to be achieved through the use of several corporations rather than one corporation. (Tr. 439-449, 480-500, 868). As a matter of fact, Mr. Sumrow, the C. P. A. made projections of income and expense to ascertain the cash flow that would be produced for several of the newly constructed vessels. (Tr. 439-449, 480-481, 850). In making these projection studies, a deduction for income tax was always predicated upon the tax rate of 30 percent (not 52 percent) on the first $25,000 of taxable income for each vessel. (Tr. 444, 448, 850).

Although the officials of the Edwards organization allegedly had formal meetings to discuss and decide upon the use of multiple corporations in their operations, no minutes or writings of any kind were ever made to reflect what, if anything, happened. The only real evidence supporting plaintiffs' testimony is one letter written by Edwards' admiralty attorneys during the adminstrative processing of this case by the Internal Revenue Service. (Tr. 255, 257-

61, 312, 584, 897-98, 1632; G. Ex. 1 for identification G. Ex. 18).

48. Mr. Charles Edwards is the person in the organization who made the ultimate decision of whether or not multiple corporations would be utilized. This would be done after considering the recommendations of the other key personnel. (Tr. 212-214, 1369-70). Mr. Edwards testified that he had not considered tax matters in deciding to incorporate each vessel constructed during the period of 1955 through 1960 and had not discussed such matters with tax counselors. (Tr. 55-57, 238, 239, 242-243). The federal taxation specialist employed by a national certified public accounting firm in Houston, Texas in fact was sought out by Mr. Edwards and from him Mr. Edwards and other of his employees obtained counseling contemporaneously with the formation of the first of the twenty corporations as to the tax advantage of the use of multiple corporations. The counseling was to the effect that (1) there was a maximum tax saving of $5,500 per annum to be achieved for each additional corporation that was utilized in the Edwards operation, and (2) there was an exemption from accumulated earnings tax of $60,000 which was allowed to each corporation. The counseling was to the effect that if Edwards used twenty-one corporations in his fleet operation instead of one corporation, there was a maximum tax savings that could be achieved of $110,000 per annum. (Tr. 1612-1617).

49. Mr. Charles Edwards, who is aging and infirm, in recent years and at the trial of this case, manifested a consistent failing of his capacity to recollect recent occurrences. He is able to vividly recount transactions that occurred during the 1930's and 1940's, but is unable to clearly recall transactions that occured during the 1950's.

(Tr. 75, 83, 84, 96, 97, 98, 99, 100, 101, 103, 104, 105-106, 134, 137).

50. Mr. Keith Edwards was not at all concerned during the 1950's whether the next vessel to be constructed (or any vessels) were placed in one of the existing partnerships or in a new corporation. As a matter of fact, he did not keep track of who owned the new vessels. He was concerned primarily with the operation of the vessels. (Tr. 1369-70).

51. Mr. Jack Redding, the general manager of the operation, was never really in a position to dictate policies. He discussed business matters and recommened courses of action, but Mr. Edwards himself was the decisive person. (Tr.867-868, 925, 1369-70).

52. Mr. Amiel Sumrow, during the time when the first one or two (of the twenty corporations involved) were organized, expressed his concern to Charles Edwards and Redding about the possible tax problems that would accure as a result of the use of the numerous corporations. Mr. Sumrow read the accounting periodicals and studied tax services, and cautioned Mr. Edwards that a business purpose was necessary. (Tr. 486, 488, 500).

53. Of all the persons in the Edwards organization, Mr. Ev Meley, Jr., the partner in Louisiana Transportation Co., displayed the most concern about his possible liability to the public as a result of liability. During the middle 1950's he was in charge of handing the damage claims against Edwards Transportation Co. *et al.* In talking to lawyers in New Orleans, he was advised of his possible exposure as a partner for claims against the partnership. He was counseled to the effect that the corporate device would limit

his liability to the investment in the corporation, and that the most conservative of all positions was to incorporate each vessel. Nothing was ever done to reduce Mr. Meley's exposure as a partner, for he remains a partner in Louisiana Transportation Company (now called Oil Cities Transportation Co.). As a matter of fact, this partnership owns half of the stock in several of the corporations (see, Par. 34, *supra,* and, of course, Mr. Meley himself owns stock in other corporations, all of which would be subject to seizure by his creditors. (Tr. 906-907).

54. Through the years going back to the 1930s, Mr. Charles Edwards' Houston admirality attorney counselled with him in respect to the limitation of liability that would be afforded through the use of the corporate device. (Tr. 55, 1137-38). However, the beginning date for the seperate corporations began in 1955. The case of *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 506, was decided on February 25, 1957. Mr. Eastman's letter with reference to spreading liability which was referred to but not offered in evidence was dated December 7, 1961.

55. The Edwards companies have always carried insurance on cargo being transported and when damage thereto occurred, adjustments were always made directly by the insurance company with the cargo owner. (G. Exs. 9 & 10, Pars. 2(0)). Insurance for personnel injury and property damage was carried in some instances but because of the cost, some of the companies carried no such insurance. The following tabulation reflects by year all of the personnel injury and property damage claims paid by all of the various companies respecting the Edwards vessels for personnel injury and property damage:

	Fiscal Year Ending During 1958	1959	1960
Edwards Transportation Co.	$38,907	$12,119	$44,271
Barge Transport Co.	3,180	7,414	5,371
Bay Sound Transportation Co.	....	....	40
Christine Towing Co.	10	1,519	1,077
Dixon Bay Transportation Co.	....	....	14
Green Bay Transportation Co.	....	....	364
Murray Bay Transportation Co.	....	....	702
Riverside Transportation Co.	....	294	16,433
Wilkins Barge Line	....	1,500	1,573
Louisiana Transportation Co.	29,540	24,627	16,843
Sterling Barge Line	286	250	25

(G. Exs. 9 & 10, Pars. 2(O); P. Ex. 4, pp. 11-14).

56. Over the years all of the companies and vessels have had claims for property damage and personal injury made against them. Some of the claims, of course, were valid and some spurious. Most claims were made with respect to operation of boats, not barges. The experience of the Edwards Transportation Co. partnership is typical; through 30 years of operation. The following are claims (whether or not valid) made with respect to barges:

Barge	Total Amount of Claims
Brazos	None
Dove	None
C. Milby	None
Curtis, Jr.	$ 2,500
George E.	5,200
Helen Mc	10,000
Hiram King	None
L. G. Cobb	None
Peggy Coyle	49,000
Perot	None
Petroleum	88,394
Salvador	None
San Jacinto	None
Trinity	None
W. J. Wyatt	None

(G. Exs. 9 & 10, Pars. 2(0); P. Ex. 4, pp. 7 & 9). The experience as to claims made (whether or not valid), against the other barge-owning organizations in the Edwards fleet is as follows:

Company	Total Amount of Claims—Inception to Date of Trial
Superior Barge Co.	$2,500
Buffalo Bayou partnership (2 barges)	2,500
Barge Transport Co. (5 barges)	2,500*
Barge Delta Joint Venture	None
Gulf Storage Co.	None
Coastal Transportation Co.	None
Ev Barge Co.	None
Jack Barge Co.	None
Naptha Barge Co.	None
Navidad Barge Co.	None
Wolverine Barge Co.	None
Michigan Barge Co.	None
Erie Barge Co.	None
Huron Barge Co.	None
Ontario Barge Co.	None
St. Clair Barge Co.	None
Lavaca Barge Co.	None

* 1950 to date of trial in 1966.

* * *

66. The Commissioner of Internal Revenue caused the various tax returns of all plaintiffs involved in this suit to be examined and as a result of such examination, additional assessments were made, paid, and in due course after claims for refund were filed, these suits demanding refunds were filed.

* * *

Discussion and Decisions

This Court has jurisdiction of the parties in the subject matter of this suit. Considering first the questions of admission of evidence that the Court had carried with the case, the rulings are as follows:

* * *

Multiple Corporation Issue

Turning now to the question of separate or multiple corporations. The question is whether the main or major purpose of the Plantiffs in incorporating a large number of vessels, 20 of them involving only one vessel, was to avoid the payment of surtaxes. The Plantiffs strenuously assert that spreading liability was the main reason for the many seperate corporations, with other purposes for being in a preferable position in the event that they had labor trouble and also it would be much easier to transfer the stock in a corporation if such was necessary by reason of sales or inheritance, and too, they claimed that it was the banker's wish that separate corporations be formed.

The seperate corporations resulted in a savings of about $110,000.00 per year. Mr. Edwards was extremely unhappy over the large amount that he had to pay of his personal income tax. He was resentful of that fact. At the time that he began formation of separate corporations, it was before the Rogers case, *supra*. As to whether the main or major purpose and reason for the separate corporations was for tax savings or some other reason or reasons is purely a question of fact. In the case of *Bonneville Locks v. United States of America* [65-1 USCC ¶ 9330], 343 F.2d 790, at 791, the United States Court of Appeals for the Ninth Circuit, on March 23, 1965, held:

"* * * A determination of what is the principal purpose of the acquisition of a corporation is a question of fact. *Kessmar Constr. Co. v. Commissioner* [64-2 USTC ¶ 9741], 336 F.2d 865 (9th Cir. 1964); *Shaw Constr. Co. v. Commissioner* [64-1 USTC ¶ 9101], 323 F.2d 316 (9th Cir. 1963); *Hawaiian Trust Co. v. United States* [61-1 USTC ¶ 9481], 291 F.2d 761 (9th Cir. 1961)."

Kessmar Construction Co. v. Commissioner of Internal Revenue, supra, was a case in which sixteen corporations had the same shareholders, and the tax court held that the principal purpose of the stockholders in forming these sixteen corporations instead of one was in evasion or avoidance of tax through the securing of tax benefits which the stockholders would otherwise not have enjoyed. The burden of proof that the Commissioner was in error was upon the Plaintiffs and they have not carried their burden. In the case of *Hiawatha Home Builders, Inc. v. Commissioner of Internal Revenue* [CCH Dec. 24884], 36 Tax Court of United States Reports, at 498, the court held:

"* * * The second issue is whether the petitioner has established 'by the clear preponderance of the evidence' that a major purpose of the transfer mentioned and described in the first issue, *supra,* was not to secure the surtax exemption or the minimum excess profits credit. The issue is *one of fact,* to be determined upon a consideration of all the circumstances relevant to the transfer. *Truck Terminals, Inc.* [CCH Dec. 24,044] 33 T. C. 876, 884; *Sno-Frost, Inc.* [CCH Dec. 23,474], 31 T. C. 1058, 1062, *acq.* 1959-2 *C. B.* 7; Income Tax Regs., Sec. 1.1551-1 (e). (Emphasis added.)

The interdicted purpose of securing the surtax exemption need not be the sole or principal purpose

> of the transfer of property. Rather, the benefit of the exemption is to be disallowed if such purpose was a major purpose. *Truck Terminals, Inc., supra.* Nor will a mere showing of a business need as actuating the transfer suffice to satisfy a taxpayer's burden of proof under section 1551. In a word, the taxpayer has the burden of establishing a negative proposition, *i.e.*, that the securing of the surtax exemption or the minimum excess profits credit was not a major purpose of the transfer."

The history and listing of the claims against the corporations and partnerships and their respective vessels for the years herein involved are significant when compared with the amount sought to be saved by the taxpayers. See: Paragraphs 55 and 56 on pages 42 and 43 of this Memorandum Opinion.

Plaintiffs have the heavy burden under the settled law of proving that the organizing of the 21 corporations was not for the purpose of securing surtax exemptions. If *one* purpose was to obtain such surtax exemption, then Plaintiffs have failed to discharge their burden. On this question of tax avoidance I hold against the Plaintiffs and in favor of the government.

* * *

The above and foregoing shall constitute the Findings of Fact and Conclusions of Law herein.

The question of court costs is adjudicated as follows:

Two-thirds shall be paid by the Plaintiffs and one-third by the Defendant.

The Clerk will notify counsel.

Appendix A

Internal Revenue Code of 1954:

SEC. 11. TAX IMPOSED.

(a) *Corporations in General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation. The tax shall consist of a normal tax computed under subsection (b) and a surtax computed under subsection (c).

(b) *Normal Tax.*—

(1) Taxable years beginning before July 1, 1964.—In the case of a taxable year beginning before July 1, 1964, the normal tax is equal to 30 percent of the taxable income.

(2) *Taxable years beginning after June 30, 1964.*—In the case of a taxable year beginning after June 30, 1964, the normal tax is equal to 25 percent of the taxable income.

(c) *Surtax.*—The surtax is equal to 22 percent of the amount by which the taxable income (computed without regard to the deduction, if any, provided in section 242 for partially tax-exempt interest) exceeds $25,000.
(26 U.S.C. 1958 ed., Sec. 11.)

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *

(26 U.S.C. 1958 ed., Sec. 61.)

* * *

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation, or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation.

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate to Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the

evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

* * *

(26 U.S.C. 1958 ed., Sec. 269.)

SEC. 451. GENERAL RULE FOR TAXABLE YEAR OF INCLUSION.

(a) *General Rule.*—The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

(26 U.S.C. 1958 ed., Sec. 451.)

SEC. 482. ALLOCATION OF INCOME AND DEDUCTIONS AMONG TAXPAYERS.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not

organized in the United States, and whether or not affiliated owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

(26 U.S.C. 1958 ed., Sec. 482.)

SEC. 544. RULES FOR DETERMINING STOCK OWNERSHIP.

(a) *Constructive Ownership.*—For purposes of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 542(a) (2), section 543 (a)(5), or section 543(a)(6)—

(1) *Stock not owned by individual.*—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

(2) *Family and partnership ownership.*—An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family or by or for his partner. For purposes of this paragraph, the family of an individual includes only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(3) *Options.*—If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to

acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

(4) *Application of family-partnership and option rules.* —Paragraphs (2) and (3) shall be applied—

(A) For purposes of the stock ownership requirement provided in section 542 (a)(2), if, but only if, the effect is to make the corporation a personal holding company;

(B) for purposes of section 543(a)(5) (relating to personal service contracts), or of section 543(a)(6) (relating to the use of property by shareholders), if, but only if, the effect is to make the amounts therein referred to includible under such paragraph as personal holding company income.

(5) *Constructive ownership as actual ownership.* — Stock constructively owned by a person by reason of the application of paragraph (1) or (3) shall, for purposes of applying paragraph (1) or (2), be treated as actually owned by such person; but stock constructively owned by an individual by reason of the application of paragraph (2) shall not be treated as owned by him for purposes of again applying such paragraph in order to make another the constructive owner of such stock.

(6) *Option rule in lieu of family and partnership rule.* —If stock may be considered as owned by an individual under either paragraph (2) or (3) it shall be considered as owned by him under paragraph (3).

* * *

(26 U.S.C. 1958 ed., Sec. 544.)

SEC. 1551. DISALLOWANCE OF SURTAX EXEMPTION AND ACCUMULATED EARNINGS CREDIT.

If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c) or the $60,000 accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this section, the ownership of stock shall be determined in accordance with the provisions of section 544, except that constructive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of section 269(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this section,

extent not inconsistent with the provisions of this section, be applicable to this section. (26 U.S.C. 1958 ed., Sec. 1551.)

* * *

TREASURY REGULATIONS ON INCOME TAX (1954 CODE):

Sec. 1.1551-1. *Disallowance of surtax exemption and accumulated earnings credit.—*

* * *

(d) *Nature of transfer.* A transfer made by any corporation of all or part of its assets, whether or not such transfer qualifies as a reorganization under section 368 is within the scope of section 1551 except that section 1551 does not apply to a transfer of money only. For example, the transfer of cash for the purpose of expanding the business of the transferor corporation through the formation of a new corporation is not a transfer within the scope of section 1551 irrespective of whether the new corporation uses the cash to purchase from the transferor corporation stock in trade or similar property.

(e) *Purpose of transfer.* In determining, for the purpose of section 1551, whether the securing of the exemption from surtax or the accumulated earnings credit constituted "a major purpose" of the transfer, all circumstances relevant to the transfer shall be considered. For disallowance of the surtax exemption and accumulated earnings credit under section 1551, it is not necessary that the obtaining of either such credit or exemption or both have been the sole or principle purpose of the transfer of the property. It is sufficient if it appears, in the light of

all the facts and circumstances, that the obtaining of such exemption or credit, or both, was one of the major considerations that prompted the transfer. Thus, the securing of the surtax exemption or the accumulated earnings credit may constitute "a major purpose" of the transfer, notwithstanding that such transfer was effected for a valid business purpose and qualified as a reorganization within the meaning of section 368. The taxpayer's burden of establishing by the clear preponderance of the evidence that the securing of either such exemption or credit or both was not "a major purpose" of the transfer may be met, for example, by a showing that the obtaining of such exemption, or credit, or both, was not a major factor in relationship to the other consideration or considerations which prompted the transfer.

(26 C.F.R., Sec. 1.1551-1.)

396 U.S. 928

BAY SOUND TRANSPORTATION CO. et al., petitioners v. UNITED STATES.

No. 507

Rehearing Denied Jan. 12, 1970

See 396 U.S. 1031, 90 S.Ct. 549.

Facts and opinion, 410 F.2d 505.

John A. Bailey, for petitioners.

Solicitor General Griswold, Assistant Attorney General Walters, and Elmer J. Kelsey, for the United States.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Nov. 17, 1969. Denied.

396 U.S. 1031

BAY SOUND TRANSPORTATION CO. et al., Petitioners, v. UNITED STATES.

No. 507.

Former decision, 396 U.S. 928, 90 S.Ct. 263.

Facts and opinion, 5 Cir., 410 F.2d 505.

Jan. 12, 1970. Petition for rehearing denied.

[7] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(Filed May 26, 1972)

BAY SOUND TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-73
UNITED STATES OF AMERICA	§	Consolidated with:
COASTAL TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-75
UNITED STATES OF AMERICA	§	
THE CHRISTINE TOWING CO.	§	
VS.	§	CA. 63-H-76
UNITED STATES OF AMERICA	§	
RIVERSIDE TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-77
UNITED STATES OF AMERICA	§	
MURRAY BAY TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-78
UNITED STATES OF AMERICA	§	
DIXON BAY TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-79
UNITED STATES OF AMERICA	§	
GREEN BAY TRANSPORTATION CO.	§	
VS.	§	CA. 63-H-80
UNITED STATES OF AMERICA	§	

ERIE BARGE CO.	§	
VS.	§	CA. 63-H-81
UNITED STATES OF AMERICA	§	
EV BARGE CO.	§	
VS.	§	CA. 63-H-82
UNITED STATES OF AMERICA	§	
GULF STORAGE COMPANY, INC.	§	
VS.	§	CA. 63-H-83
UNITED STATES OF AMERICA	§	
LAVACA BARGE CO.	§	
VS.	§	CA. 63-H-84
UNITED STATES OF AMERICA	§	
NAPTHA BARGE CO.	§	
VS.	§	CA. 63-H-85
UNITED STATES OF AMERICA	§	
NAVIDAD BARGE CO.	§	
VS.	§	CA. 63-H-86
UNITED STATES OF AMERICA	§	
WOLVERINE BARGE CO.	§	
VS.	§	CA. 63-H-87
UNITED STATES OF AMERICA	§	
HURON BARGE CO.	§	
VS.	§	CA. 63-H-88
UNITED STATES OF AMERICA	§	
[8]		
MICHIGAN BARGE CO.	§	
VS.	§	CA. 63-H-89
UNITED STATES OF AMERICA	§	

SUPERIOR BARGE CO.	§	
VS.	§	CA. 63-H-90
UNITED STATES OF AMERICA	§	
ONTARIO BARGE CO.	§	
VS.	§	CA. 63-H-91
UNITED STATES OF AMERICA	§	
ST. CLAIR BARGE CO.	§	
VS.	§	CA. 63-H-92
UNITED STATES OF AMERICA	§	
JACK BARGE CO.	§	
VS.	§	CA. 63 H-93
UNITED STATES OF AMERICA	§	

Masquelette, Bailey, Donisi & Haynes (John A. Bailey), Houston Citizens Bank Bldg., Houston, Texas 77002, for Plaintiffs.

Charles G. Barnett, Attorney, Tax Division, Department of Justice, 8E2 Federal Office Bldg., 1100 Commerce, Dallas, Texas 75102, for Government

[May 26th, 1972]

MEMORANDUM OPINION AND SUPPLEMENTAL FINDINGS OF FACT:

These cases were tried to the Court without a jury. The Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit and that Court affirmed in part and remanded in part these cases for further proceedings not

inconsistent with the determination of the appellate court. Plaintiffs thereafter filed a petition for a writ of certiorari with the United States Supreme Court and that petition was denied.

The only question now presented for determination by this Court is whether the principal purpose motivating the separate incorporation of the various barges and vessels acquired by the Edwards fleet[1] in 1955 and subsequent years was the evasion or avoidance of federal income taxes by securing the benefit of multiple surtax exemptions.

STATUTES INVOLVED

The statute pertinent to the unresolved issue in this case is set forth in the Appendix, *infra*.

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1. The corporations involved in this issue are:

Name of Plaintiff	*Civil Action No.*
Bay Sound Transportation Co.	63-H-73
Coastal Transportation Co.	63-H-75
Christine Towing Co.	63-H-76
Riverside Transportation Co.	63-H-77
Murray Bay Transportation Co.	63-H-78
Dixon Bay Transportation Co.	63-H-79
Green Bay Transportation Co.	63-H-80
Erie Barge Co.	63-H-81
Ev Barge Co.	63-H-82
Gulf Storage Co., Inc.	63-H-83
Lavaca Barge Co.	63-H-84
Naptha Barge Co.	63-H-85
Navidad Barge Co.	63-H-86
Wolverine Barge Co.	63-H-87
Huron Barge Co.	63-H-88
Michigan Barge Co.	63-H-89
Superior Barge Co.	63-H-90
Ontario Barge Co.	63-H-91
St. Clair Barge Co.	63-H-92
Jack Barge Co.	63-H-93

[10] See Bay Sound Transportation Company v. United States, 410 F.2d 505 at page 512:

> "Section 269 provides that if any person acquires control of a corporation and the principal purpose of this acquisition is evasion of income taxes by securing the benefit of a deduction, credit, or other allowance, which he would not otherwise enjoy, then the deduction credit or allowance may be disallowed. The determination of the taxpayer's principal purpose in incorporation is a question of fact that depends upon the intent of the taxpayer at the time he acquires control of the corporation. See Airport Grove Corp. of Polk County, et al. v. United States of America, 5 Cir., 1969, 408 F.2d 870. The taxpayer has the burden of proving that control was not acquired for the unlawful purpose. American Pipe & Steel Corp. v. Commissioner, 243 F.2d 125 (9 Cir., 1957).

In Bobsee Corporation v. United States, 411 F.2d 231 at 238, the Fifth Circuit held:

> "The proscription of section 269 obtains where the *principal purpose* for the acquisition of a corporation is tax avoidance. The IRS has determined that each of the appellant corporations was organized for the principal purpose of obtaining the surtax exemption and this determination is presumptively correct.[21] The burden of proving that tax avoidance was not the principal purpose is on the taxpayer.[22] Theoretically the question of purpose is purely subjective; pragmatically, however, the trier of fact can only determine purpose from objective facts. Thus, unless the taxpayer can muster facts sufficiently plausible to convince the trier of the purity of his motives, the IRS will prevail.

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21. Welch v. Helvering, 290 U.S. 111, 115, 54 S.Ct. 8, 78 L.Ed. 212 (1933).

"Under the definition of "control" in subsection 269(a), the presence of a principal tax-avoidance purpose on behalf of any fifty-percent interest in an acquired corporation renders the corporation subject to disallowance of the surtax exemption. Of course, the purpose of the actual fifty-percent shareholder may in certain circumstances be completely irrelevant. For example, if a business manager attends to all the details of a business—including the organization of corporate forms—the owner's mind might be a perfect tabula rasa. The relevant "mind" is the person who actually has a purpose, that is, other than the [11] general purpose of making money.[23] Thus the statute cannot be sidestepped by merely divorcing purpose from ownership.[24]

"This court has held that the *principal purpose* is the purpose which exceeds all other purposes in im-

22. Green Light Co. v. United States, 405 F.2d 1068, 1070 (5th Cir. 1968); Dorba Homes, Inc. v. Commissioner of Internal Revenue, 403 F.2d 502, 505 (2d Cir. 1968).

23. Classical analysis would probably deem the general desire to make money a *motive* rather than a purpose. See Blum, Motive, Intent, and Purpose in Federal Income Taxation, 34 U. Chi. L. Rev. 485, 486-87 (1967). However, since triers of fact are not likely to observe such refinements, the terms are treated as synonymous in this largely pragmatic analysis.

24. In Dorba Homes, Inc. v. Commissioner of Internal Revenue, 403 F.2d 502 (2d Cir. 1968), the controlling owners of two corporations—Lumar Homes, Inc. and Dewmar Construction Co., Inc.—were the wives of the actual promoters. The Second Circuit held that, since the wives did not appear and testify on behalf of the taxpayer-corporations, the IRS could not prevail because the ownership of the controlling shares could not be attributed to the husbands. Id. 506-507. We cannot accept this analysis for two reasons. First, the burden of proof is on the corporations to prove that tax avoidance was not the principal purpose of their formation; if the purpose of the controlling owners is relevant and they do not come forward on behalf of the corporations, then the IRS must prevail. And second, the facts surrounding the formation of both wives' corporations indicate that the wives' purpose, if any was irrelevant.

portance.[25] Citing Treas. Reg. § 1.269-3 (1962), both parties state a standard different from the one adopted by the court, *viz.*, that a purpose is the principal purpose if it exceeds in importance *any other purpose.*"

[12]

In the Atlas Storage Company v. United States, 306 F. Supp. 570 at 581, the Court stated:

> "In any event, however, even if it be conceded that the advantages itemized by Maier were legitimate business purposes for this corporate arrangement, they are not sufficient to carry the day for the taxpayers in this litigation in the light of the overwhelming evidence of the tax advantages obtained thereby. It is not necessary under the statute that tax avoidance be the sole purpose of the arrangement, but only that it be the "principal purpose." See J. T. Slocomb Co. v. C.I.R., *supra.* As heretofore pointed out, the burden rests upon the taxpayer to show that such avoidance was not the principal purpose of the acquisition, and under the evidence in this case, it is my conclusion that the taxpayers have failed to carry that burden. Accordingly, it is my further conclusion that the taxpayer corporations were acquired for the principal purpose of evading or avoiding federal income taxes within the meaning of Section 269 of the Internal Revenue Code of 1954 and that the Commissioner of Internal Revenue properly disallowed the surtax exemption for the several taxpayer corporations except for one corporation in each of the three geographical areas."

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25. Green Light Co. v. United States, 405 F.2d 1068, 1070 (5th Cir. 1968).

See Shaw Construction Co. v. C.I.R., 323 F.2d 316 and cases which are therein cited. U. S. Court of Appeals, Ninth Circuit, 1963.

The Atlas case was affirmed by the Fourth Circuit in 1971. See 437 Federal Reporter 1319. This opinion which involved some eighteen warehouse corporations controlled by one person was affirmed as to fifteen of the eighteen warehouse corporations.

In Airport Grove Corp. of Polk County v. United States, 408 F.2d 870 (1969), decided by the Fifth Circuit in 1969, the Court wrote some fifteen citrus groves separately incorporated that:

> "Section 269 provides that if any person acquires control of a corporation and the principal purpose of this acquisition is evasion of income taxes by securing the benefit of a deduction, credit, or other allowance which he would not otherwise enjoy, then the deduction, credit, or allowance may be disallowed. The determination of the taxpayer's principal purpose in incorporation is a question of fact that depends upon the intent of the taxpayer at the time he acquires control of the corporation. See Southland Corp. v. Campbell, 5 Cir. 1966, 358 F.2d 333, 337; Green Light Co. v. United States, 5 Cir. 1968, 405 F.2d 1068. 7 Mertens, Law of Federal Income Taxation § 38.69 (1967). The Taxpayer has the burden of proving that control was *not* acquired for the unlawful purpose. American Pipe & Steel Corp. v. Commissioner of Internal Revenue, 9 Cir. 1957, 243 F.2d 125."

[13] In Bobsee Corporation v. United States, (5th Cir., 1969) 411 F.2d 231, at page 238, "control" is defined as follows:

> "Under the definition of "control" in subsection 269(a), the presence of a principal tax-avoidance purpose on behalf of any fifty-percent interest in an acquired corporation renders the corporation subject to disallowance of the surtax exemption."

Coming now to the questions of fact. While this Court has carefully examined, reviewed and studied the statement of facts in this case consisting of more than 1,827 pages of testimony and in addition thereto the pleadings and the exhibits, it is thought best to restate some of the testimony with reference to the question of multiple corporation issue: C. W. Edwards was the master mind and the ultimate decision maker in the organization of the eighteen new vessels incorporated. He alone let the contracts for the construction of the vessels and as they were completed and delivered, the corporations took title. The vessels were then placed in service with the Edwards fleet. Of the 20 corporations organized between 1955 and 1960, 14 each owned one barge, and 6 each owned one boat. (G. Exs. 7 & 8, pars. 37, 38, 44, 46, 48, 49, 50, 52, 54, 56, 58, 60, 62, 63, 65, 67, 69, 71, 73, 75, 76 and 77). Mr. Edwards was the major stockholder and chief executive officer of all the said corporations except the two in which his son was major stockholder and chief executive officer. None of the barge corporations had any employees. The only employees of the boat corporation other than members of the crews, are as follows:

Name of employee	*Name of corporation-employer*
Keith Edwards	
J. A. Hendricks (Maintenance)	Christine Towing Co.
Vera McNeilly (Bookkeeper)	Christine Towing Co.
(Tr. 449-457; P. Ex. 4, pp. 24-42).	Green Bay Transportation

[14] Messrs. Edwards and Hendricks were also employees of either Barge Transport Co. or Edwards Transportation Co. and they drew the bulk of their pay from these organization. (P. Ex. 4, pp. 39-42). The adminstra-

tive personnel for the organization were employed by either Edwards Transportation Co. or Barge Transport Co. (Tr. 459-75).

The operation of Edwards Transportation Co. and Barge Transport Co., the several partnerships that owned vessels (Wilkins Barge Line, Louisiana Transportation Co., Buffalo Bayou Transportation Co., Barge Delta Joint Venture, and Sterling Barge Line), and the twenty vessel-owning corporations was essentially as follows:

(a) All of the companies utilized the same office address. (G. Exs. 7 & 8, pars. 34)

(b) Edwards Transportation Co. and Barge Transport Co. had telephone listings and were the only two companies known (other than Wilkins Barge Line for a time) to the general public; these two companies acting through Mr. C. W. Edwards obtained all business for the entire group of Edwards' companies. (G. Exs. 7 & 8, pars. 33, Tr. 479-480, 765-67, 852).

C. W. Edwards arranged for the corporations to be formed and arranged for the borrowing of the money to finance the construction of 20 boats and barges involved in this suit.

Edwards, in all but two of the companies, owned the majority of the stock. He personally solicited all of the business that was obtained for all of the companies. He personally directed which company would perform the services that were [15] performed. There were no written or formal negotiations or contracts between Edwards Transportation Co. and/or Barge Transport Co. and the five partnerships and twenty vessel-owning corporations. Re-

cords governing all the transactions were maintained by either Edwards Transportation Co. or Barge Transport Co. Amounts to be collected from the boat corporations and partnership by all of the various barge corporations and partnerships were recorded on the books of the various barge corporations and partnerships as "accounts receivable". The amounts were then entered into the books of account of the boat corporations and partnerships as "accounts payable". Then the boat companies calculated the amounts "owed" them by either Edwards Transportation Co. for transportation services performed during the preceding month. Such amounts were recorded on the boat companies' books of account as "accounts receivable". (Tr. 458-473, 854-59).

Barge Transport Co. and Edwards Transportation Co. recorded the boat companies' charges as "accounts payable". Barge Transport Co. and/or Edwards Transportation Co. would then bill the person for whom the services were performed, such as Texaco, Inc., Gulf Refining Co., etc. When the money covering the invoices was received by Edwards Transportation Co. and/or Barge Transport Co., they drew checks on their respective bank accounts to pay the boat companies; the boat companies deposited the checks and drew checks of their own in favor of the barge companies. All of this bookkeeping work was accomplished in one office by five or six bookkeepers who were employees of Edwards Transportation Co. and/or Barge Transport Co. Books of account were maintained for each of the twenty new corporations and, of course, bank accounts were maintained. (Tr. 458-473, 854-59).

[16] C. W. Edwards was a very astute businessman, keenly aware of the advantages to be obtained from the incor-

poration of each of the vessels constructed during the period of 1955 to 1960. He was also greatly desirous of obtaining as much tax release as possible because he was then in a 90% plus income tax bracket. He was quite infirmed and was of an advanced age. Mr. Keith Edwards, the only child of C. W. Edwards, stated that he was not at all concerned during the 1950's whether the next vessel or any vessel were placed in an existing corporation or in a new corporation.

C. W. Edwards was bitterly resentful of the fact that he was compelled to pay such a high percentage of his income out in federal taxes. The question that Plaintiff raised with reference to liability is not sustained by the claims for personal injury and property damage paid during the period material hereto. An attempt to obtain tax advantages on two other questions, to-wit: depreciation of vessels and entertainment expenses, significantly shows his desire to avoid federal taxes.

In the case of Taylor v. Standard Gas & Electric Co., 96 F.2d 693 (C.A. 10th Cir.) reversed on other grounds, 306 U.S. 307, (1939), the Court held that in determining if a subsidiary is a mere instrumentality of the parent, many factors are relevant and some of the factors generally considered by courts are:

> "When the operations of the plaintiffs are compared with the factors listed in the foregoing table, it becomes obvious that in any tort action, the plaintiffs were in greater danger of having their separate corporate existence ignored for the purpose of liability than in having a court find 'ways of circumventing the Limitation [of Ship Owners' Liability] Act'."

In this case, the only evidence that tax evasion or avoidance was not the principal motive behind the separate incorporation of the various barges and vessels acquired by the [17] Edwards group in 1955 and subsequent years was the unsupported statements of Mr. Edwards, his son, his employees and agents. In *American Properties, Inc. v. Commissioner,* 28 T.C. 1100 (1957), the court, after noting that the issue present in that case also turned upon a question of intent stated (p. 1111):

> "The statement of an interested party of his intention and purpose is not necessarily conclusive. Helvering v. National Grocery Co., 304 U.S. 282, affirming 35 B.T.A. 163. In *R. L. Blaffer & Co.*, 37 B.T.A. 851, affd. (C.A. 5) 103 F.2d 487, certiori denied 308 U.S. 576, we stated that one's categorical statement may be of less weight than the facts and circumstances which affect it and that "[t]o be skeptical of the weight to be accorded an interested witness' statement in view of other evidence is not the same as wholly to reject the statement as if it were dishonest."

At trial, plaintiffs offered only the self-serving testimony of Mr. Edwards, his son, his employees, and his attorneys in an attempt to establish that tax avoidance played no part in the formation of a separate corporation for each barge or vessel acquired by the Edwards fleet. The principal thrust of this testimony was to the effect that the various barges and vessels of the Edwards fleet were separately incorporated for the purpose of limiting exposure to liability for claims arising out of the operation of the vessels. Plaintiffs also contend that the separate incorporation of barges and vessels reduced the possibility of the entire Edwards fleet being tied up by labor disputes.

Although defendant served numerous subpoenas duces tecum upon the plaintiffs in an effort to compel them to produce documentary evidence supporting their alleged purposes for the formation of multiple corporations, the only item produced in response thereto was a letter from plaintiffs' admiralty [18] attorney dated December 7, 1961, long after the tax years involved and contemporaneously with the assertion of the multiple corporation issue by the Internal Revenue Service.

With regard to Christine Towing Company and Naptha Barge Company, plaintiffs have clearly failed to establish that the obtaining of additional surtax exemptions was not their principal purpose for separately incorporating each vessel. C. W. Edwards testified at trial that Keith Edwards decided to use multiple corporations in these two instances (Tr. 218), but Keith Edwards testified that he could care less whether the vessels were placed in a corporation or a partnership (Tr. 1369-1370). The Government is entitled to prevail as to Christine Towing Company and Naptha Barge Company in default of any evidence covering intent with regard to those entities.

Although plaintiffs did put on some general testimony as to the purpose behind the formation of the remaining 18 corporations, such testimony will not stand the test of critical examination. All of plaintiffs' witnesses spoke of "liability from claims" as the significant reason motivating formation of the corporations. The limitation of liability which plaintiffs asserted as the purpose of incorporating each vessel, however, already existed to a substantial extent under the laws of the United States. The Act of March 3, 1851, c. 43, 9 Stat. 635, commonly known as the Limitation of Ship Owners' Liability Act (46 U.S.C.

§§ 183 through 196) provides that a ship owner could limit his liability to the value of his vessel in all instances where he was not personally privy to the tort committed or had knowledge of the liability incurred. Although *Rogers v.* [19] *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), and related cases, may have increased an employer's liability, as previously understood in the industry, for injuries to employees under the Act of April 22, 1908, c. 149, 35 Stat. 165, as amended in 45 U.S.C. §§ 51 through 60 (commonly known as the Employers' Liability Act), and the Act of June 5, 1920, c. 250, 41 Stat. 933 (46 U.S.C. §§ 688) (commonly known as the Jones Act), those cases were not decided until February 25, 1957, some two years after the decision was made in 1955 to separately incorporate the plaintiffs' vessels.

Although plaintiffs' witness, Mr. Frank Emmett, testified that "courts are finding ways of circumventing the Limitation [of Ship Owners' Liability] Act" (Tr. 552, 553), he failed to point out with equal vigor that courts are similarly ignoring the separate corporate existence of entities such as the plaintffs when to do so furthers the ends of justice. The principle is well established that a corporation which exercises actual control over another and operates the latter as a mere instrumentality or tool is liable for the torts and obligations of the corporation thus controlled. *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (C.A. 7, 1963); *Kimberly Coal Co. v. Douglas*, 45 F.2d 25 (C.A. 6, 1930); *Buie v. Chicago R.I. & P.R. Co.*, 95 Tex. 51, 65 S.W. 27 (1901); *Taylor v. Standard Gas & Electric*, 96 F.2d 693 (C.A. 10, 1938), rev'd on other grounds, 306 U.S. 307 (1939). In *Taylor v. Standard Gas & Electric Co.*, *supra*, the court noted (p. 704) that in determining if a subsidiary is a mere

instrumentality of the parent, many factors are relevant; and some of the factors generally considered by courts are:

[20]

1. Common stock ownership.

2. Common directors or officers.

3. Financing of the subsidiary by the parent.

4. The incorporation of the subsidiary being caused by the parent.

5. Grossly inadequate capital for the subsidiary.

6. Payment by the parent of the salaries and other expenses or losses of the subsidiary.

7. The subsidiary receiving no business except that given to it by the parent.

8. The parent using the subsidiary's property as its own.

9. The directors or officers of the subsidiary not acting independently in the interest of the subsidiary but taking their orders from the parent in the latter's interest.

When the operations of the plaintiffs are compared with the factors listed in the foregoing table, it becomes obvious that in any tort action, the plaintiffs were in greater danger of having their separate corporate existence ignored for the purposes of liability than in having a court find "ways of circumventing the Limitation [of Ship Owners' Liability] Act."

If the testimony of the plaintiffs' witnesses were taken at face value, it would appear that the major business concern of the Edwards group was the limitation of

liability. Such testimony, however, loses much of its impact in light of the fact that Edwards Transportation Company, the *largest* operating unit of the Edwards group, has carried on business *as a partnership* since the mid-1930's. The [21] next largest unit of the Edwards group was Barge Transport Company, which was organized in 1939, and which operated two tugboats, five barges, and one small boat without the necessity of separate corporations for each vessel. See paragraph 5 of the Court's memorandum opinion. C. W. Edwards' lack of concern about the limitation of liability is amply demonstrated by the Edwards Fleet's use of the partnership form of doing business with the barges and vessels owned by Barge Delta Joint Venture, Buffalo Bayou Transportation Company, Wilkins Barge Line, and Louisiana Transportation Company. It is also interesting to note that the largest and most valuable ship in the Edwards fleet, the pushboat "Letha C.," is operated by Sterling Barge Company, a *partnership* comprised of C. W. Edwards and his son, Keith.

In the Pepi, Inc. v. C.I.R. case the Second Circuit recently stated in 488 F.2d 141 at 144:

> "In determining whether the principal purpose of an acquisition was the avoidance of tax liability, the fact-finder must scrutinize *all* of the circumstances surrounding the transaction. I.R.C. Reg. § 1.269-3. Once the Commissioner had made the determination that the principal purpose of a transaction was tax avoidance, the taxpayer bears the burden of showing by a preponderance of the evidence that the Commissioner's determination was erroneous. J. T. Slocomb Co. v. Commissioner of Internal Revenue, 334 F.2d 269, 273-274 (2d Cir. 1964)."

The plaintiffs' argument that the use of separate corporations was a device for labor relations purposes is without merit.

[22] This Court therefore makes the following additional Findings of Fact:

1. On June 13, 1969, the United States Court of Appeals for the Fifth Circuit entered a judgment which remanded the instant case "in part for further proceedings not inconsistent with the opinion of this Court."

2. On November 17, 1969, the Supreme Court of the United States denied plaintiffs' application for a writ of certiorari.

3. The findings of fact contained in the Memorandum Opinion of this Court filed August 30, 1967, are adopted, ratified, and incorporated herein as findings of fact of the Court upon remand.

4. Plaintiffs have failed to establish that the principal purpose motivating the separate incorporation of the various barges and vessels acquired by the Edwards fleet in 1955 and the years subsequent thereto was not the evasion or avoidance of federal income taxes by securing multiple surtax exemptions.

5. The preponderance of the evidence of record establishes that the principal purpose motivating the separate incorporation of the various barges and vessels acquired by the Edwards fleet in 1955 and the years subsequent thereto was the evasion or avoidance of federal income taxes by the securing of multiple surtax exemptions.

In *Scroll, Inc. a Florida Corporation v. Commissioner of Internal Revenue*, the United States Court of Appeals,

Fifth Circuit, decided on August 13, 1971, 447 F.2d 612 at page 616, wherein Chief Judge Brown stated:

> "Certainly we must recognize that as a matter of common sense and business acumen experienced corporate executives and their advisers may legitimately attempt to surround the proposed maneuver with factors which maximize at least one of the legitimate [23] business purposes beyond the hope or expectation of the tax purpose. But equally as certain the key to this thorny problem of subjective intent does not lie in methodically characterizing all of the taxpayer's asserted non-tax motives as spurious. Whether legitimate business purposes did in fact induce the transaction, and if so to what extent, whether they were mere window dressing or afterthoughts, or whether the tax-saving purpose outran thoughts, or whether the tax-saving purpose outranked any one of the credited business motives are all questions of fact upon which the taxpayer has the burden. American Pipe & Steel Corp. v. Commissioner of Internal Revenue, 9 Cir., 1957, 243 F.2d 125, cert. denied 355 U.S. 906, 78 S.Ct. 333, 2 L.Ed.2d 261. Unless clearly erroneous, the finding of the Tax Court must stand. Commissioner of Internal Revenue v. Duberstein, 1960, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218, 26 U.S.C.A. § 7482."

The foregoing constitutes Findings of Fact and Conclusions of Law herein. Any Finding of Fact hereinabove made which also constitutes a Conclusion of Law is adopted as a Conclusion of Law. Any Conclusions of Law herein made which also constitutes a Finding of Fact is hereby adopted as a Finding of Fact.

The Clerk will notify Counsel.

Dated at Houston, Texas this the 26th day of May, 1972.

ALLEN B. HANNAY
United States District Judge

APPENDIX

[24]

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.* —If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion of avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of

stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or his Delegate to Allow Deduction, etc., in Part.* —In any case to which subsection (a) applies, the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect [25] to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made: or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

* * *

[26] JUDGMENT

(Caption Omitted)

(Filed August 7, 1972)

Judgment having been entered herein on October 3, 1967, and plaintiff having prosecuted an appeal therefrom to the United States Court of Appeals for the Fifth Circuit, and the Court of Appeals, in its opinion dated April 30, 1969, having affirmed in part and reversed in part the holdings of this Court and by its order dated June 12, 1969, having remanded the case for further proceedings not inconsistent with the determination of the Court of Appeals, and plaintiff's petition for a writ of certiorari to the United States Supreme Court having been denied on November 17, 1969, and, following remand to this Court, the Court, after considering the evidence of record and the arguments of the parties, having entered its memorandum opinion and supplemental findings of fact on May 26, 1972, it is, in conformity therewith,

[27] ORDERED, ADJUDGED, AND DECREED that judgment heretofore entered herein is set aside, annulled, and revoked, and it is further

ORDERED, ADJUDGED, AND DECREED that plaintiff, Bay Sound Transportation Company, take nothing, and that its complaint be dismissed with prejudice, and it is further

ORDERED, ADJUDGED, AND DECREED that two-thirds of all taxable costs incurred herein shall be paid by the plaintiff and one-third of all taxable costs incurred herein shall be paid by the defendant.

JUDGMENT rendered and signed in Houston, Texas, on this 7th day of August, 1972.

/s/ ALLEN B. HANNAY
United States District Judge

[28] **EXHIBIT "A"**

The take-nothing judgments entered in Civil Actions Nos. 63-H-76 through 63-H-80 are identical (except as to name of plaintiff) with the take-nothing judgment in No. 63-H-73 *(Bay Sound Transportation Co., et al. v. United States of America), supra.*

[29] JUDGMENT

(Caption Omitted)

(Filed Aug. 7, 1972)

Judgment having been entered herein on March 7, 1969, and plaintiff having prosecuted an appeal therefrom to the United States Court of Appeals for the Fifth Circuit, and the Court of Appeals, in its opinion dated April 30, 1969, having affirmed in part and reversed in part the holdings of this Court and by its order dated June 12, 1969, having remanded the case for further proceedings not inconsistent with the determinations of the Court of Appeals, and plaintiff's petition for a writ of certiorari to the United States Supreme Court having been denied on November 17, 1969, and, following remand to this Court, after considering the evidence of record and the arguments of the parties, having entered its memorandum opinion and supplemental findings of fact on May 26, 1972, it is, in conformity therewith,

ORDERED, ADJUDGED, AND DECREED that the judgment heretofore entered herein is set aside, annulled, and revoked, and it is further

[30] ORDERED, ADJUDGED, AND DECREED that plaintiff, Coastal Transportation Company, have judgment against defendant, United States of America, in the sum of $3,192.62, together with interest thereon at the rate of six percent (6%) per annum, as provided by law, and it is further

ORDERED, ADJUDGED, AND DECREED that two-thirds of all taxable costs incurred herein shall be paid by the plaintiff and one-third of all taxable costs incurred herein shall be paid by the defendant.

JUDGMENT rendered and signed in Houston, Texas, on this 7th day of August, 1972.

ALLEN B. HANNAY
United States District Judge

[31] EXHIBIT "B"

The judgments in Civil Actions Nos. 63-H-81 through 63-H-93 are identical, except as to amount of recovery and name of plaintiff, with the judgment in No. 63-H-75 *(Coastal Transportation Co. v. United States).*

The amounts of the judgments in such other cases are as follows:

Name of Plaintiff	*Civil Action No.*	*Amount of Judgment*
Erie Barge Co.	63-H-81	$ 1,663.38
Ev Barge Co.	63-H-82	1,494.45
Gulf Storage Co.	63-H-83	685.95
Lavaca Barge Co.	63-H-84	1,358.58
Naptha Barge Co.	63-H-85	3,062.84
Navidad Barge Co.	63-H-86	1,358.69
Wolverine Barge Co.	63-H-87	3,007.35
Huron Barge Co.	63-H-88	1,663.37
Michigan Barge Co.	63-H-89	1,663.30
Suprerior Barge Co.	63-H-90	1,663.30
Ontario Barge Co.	63-H-91	1,333.93
St. Clair Barge Co.	63-H-92	1,333.93
Jack Barge Co.	63-H-93	1,269.41

BAY SOUND TRANSPORTATION CO.
et al., Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 72-3208.

United States Court of Appeals,
Fifth Circuit

April 12, 1973.

Appeal from the United States District of Texas; Allan B. Hannay, Judge.

PER CURIAM:

We affirm on the basis of the well reasoned memorandum opinion of the district court, Bay Sound Transportation Co. v. United States of America, 350 F.Supp. 420 (S.D. Tex., 1972). The case received comprehensive treatment in the district court and we are unable to perceive error.

Affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3208

BAY SOUND TRANSPORTATION CO., ET AL,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 12, 1973, 5 Cir., 1973, ____F.2d ____).

(June 28, 1973)

Before BELL, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

No. 73-799

JAN 14 19

In the Supreme Court of the United States

OCTOBER TERM, 1973

BAY SOUND TRANSPORTATION CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-799

BAY SOUND TRANSPORTATION CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are corporations owned or controlled by C.W. Edwards and his son Keith Edwards. The corporations own tugs and/or barges. The sole question presented is whether petitioners are entitled to the corporate surtax exemption provided by Section 11 of the Internal Revenue Code of 1954 for the years 1958-1960.

1. During the years at issue, Section 11 allowed each corporation an exemption for its first $25,000 of taxable income from the 22 percent surtax. The first $25,000 of taxable income was subject only to the normal tax of 30 percent and the excess was subject to a 52 percent tax rate. As a result, the overall tax liability of a business would be much less if its income were divided among several corporations.

In order to discourage the tax-motivated use of multiple corporations by what is essentially a single business,

Section 1551 of the Code denies the surtax exemption to a corporation which receives property from another corporation where: (1) the transferee corporation was created for the purpose of receiving the property or was not actively engaged in business at the time of the transfer; and (2) if the transferor and transferee are under common control. The provision applies unless the transferee establishes by a "clear preponderance of the evidence" that the securing of the surtax exemption was not a major purpose of the transfer.

The disallowance of petitioners' surtax exemptions for the years 1958-1960 by the Commissioner under Section 1551 was upheld by the district court in the first stage of this litigation (Pet. Add. 12-64). The court of appeals reversed, holding that Section 1551 was inapplicable because the evidence did not establish that any corporation transferred the boats. The court remanded the case, however, for the district court "to determine whether or not the findings of fact on the record are sufficient to disallow the exemptions of the surtax under Section 269," which had also been urged by the Commissioner (Pet. Add. 1-8).[1] Section 269(a) of the Code provides that if any person acquires a controlling stock interest in a corporation "and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed."

On remand, the district court adopted the findings of fact contained in its original memorandum and found in

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[1]The opinion of the court of appeals is officially reported at 410 F. 2d 505. This Court denied a petition for a writ of certiorari filed by petitioners from that decision. 396 U.S. 928.

addition that petitioners had failed to establish that "the principal purpose motivating the separate incorporation of the various barges and vessels acquired by the Edwards fleet in 1955 and the years subsequent thereto was not the evasion or avoidance of federal income taxes by securing multiple surtax exemptions." It further found that the "preponderance of the evidence of record established that the principal purpose motivating the separate incorporation * * * was the evasion or avoidance of federal income taxes by the securing of multiple surtax exemptions" (Pet. Add. 83).[2] The court of appeals affirmed *per curiam* (Pet. Add. 91).

2. Petitioners contend (Pet. 12) that "it is an unconstitutional taking of property without due process, in violation of the Fifth Amendment, for the government intentionally and irrationally to exact a federal tax in an unequal manner." The sole basis for this argument is the fact that the government did not appeal the decision of the district court in *Tidewater Hulls, Inc.* v. *United States,* 68-1 U.S.T.C., par. 9405 (E.D. La., 1968). There, the district court found that various tug and barge-owning corporations separately incorporated by the Laborde interests had not been separately incorporated principally for the prohibited purpose. But the government's failure to appeal that decision cannot support petitioner's Fifth Amendment claim of discriminatory treatment.

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[2]The evidence showed that Charles Edwards, the major stockholder, made the ultimate determination concerning utilization of multiple corporations (Pet. Add. 48, 74). Although he claimed that taxes played no part in his decision to incorporate separately, and that he had not discussed such matters with his tax advisors, there was substantial evidence supporting the finding that the separate incorporations were tax-motivated (Pet. Add. 46-48, 76-77). His assertion that limitation of liability was the principal purpose for separate incorporation was contradicted by the fact that he allowed much of his business to remain in partnership form (Pet. Add. 81-82).

The ultimate question in every Section 269 case is the factual one whether the taxpayer's principal purpose for an acquisition was for the evasion or avoidance of tax. The government's refusal in one case to challenge a district court's determination on particular facts as "clearly erroneous" can have no bearing on the validity of the determination by another district court in another case involving entirely different taxpayers, regardless of the alleged factual similarities between the two cases. Indeed, the fact that the government contested the separate surtax exemptions in both the *Tidewater* and this case is sufficient to refute any allegation of discriminatory treatment against petitioners.

3. Contrary to petitioners' assertion (Pet. 16-22), there is no conflict of decisions. *Sirbo Holdings, Inc.* v. *Commissioner,* 476 F. 2d 981 (C.A. 2), is not in point. There the court reversed the Tax Court's finding that a tenant's payment to a landlord in satisfaction of the tenant's obligation to restore the premises was ordinary income to the landlord, rather than income taxable at capital gains rates, because the Commissioner in a contemporary Tax Court case (*Boston Fish Market Corp.* v. *Commissioner,* 57 T.C. 884) had conceded that such a receipt was not taxable at ordinary income rates. The only remaining question was whether such a payment was taxable at capital gains rates or was excludable from income. There is no such conflict between the legal position of the government here and in the *Tidewater* case.

Similarly, petitioner's reliance upon *Farmers' and Merchants' Bank* v. *United States,* 476 F. 2d 406 (C.A. 4), is misplaced. That decision rejected an attempt by the Commissioner (through a retroactive ruling) to apply different tax treatment to identically situated taxpayers on the basis of a different legal standard, without

showing a rational basis for the difference. Unlike that case, the questions here and in *Tidewater* are factual and, at all events, the government contested the surtax exemptions in both cases.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

DOJ-1974-01

SUPREME COURT, U. S.

FILED

FEB 1 197

MICHAEL RODAK, JR.,

NO. 73-799

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

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NO. 73-799

IN THE

Supreme Court of the United States

October Term, 1973

BAY SOUND TRANSPORTATION CO., et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

In its memorandum in opposition to petitioners' application for certiorari, the government ignores that which it cannot deny, i.e., (1) that it has judicially admitted that *Bay Sound* "is on all fours with the facts in *Tidewater*" and that Bay Sound is more entitled to the surtax exemptions at issue than was Tidewater, (2) that it eventually acquiesced in the granting of the exemptions to Tidewater

and (3) that it continues its efforts to deny the exemptions to Bay Sound to this day. Its admissions in *Tidewater* make immaterial the government's statement that "the ultimate question in every Section 269 case is the factual one," and its reference to the similarities between the two cases as "alleged" utterly out of place. (Mem. 4).

Petitioners' position that the rationale of the *Sirbo Holdings* case clearly requires a reversal *Bay Sound* is in no way answered by the five-sentence paragraph devoted to that case in the government's memorandum, three of those sentences being no more than bald statements that the case is "distinguishable." (Mem. 4). The government initially contested the rights of both Sirbo Holdings and Boston Fish Market to capital gains treatment just as it initially contested the rights of both Bay Sound and Tidewater to surtax exemptions. The government tacitly abandoned its contest of capital gains treatment in *Boston Fish Market* by failing to brief that issue in the Tax Court[1] but continued to contest capital gains treatment in *Sirbo Holdings*. The government actively abandoned its con-

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1. This is shown by the following excerpt from *Sirbo Holdings, Inc. v. Commissioner*, 476 F.2d 981 at 987: "Two months after the [Tax Court] decision [in Sirbo Holdings], Judge Raum of the Tax Court accorded capital gains treatment to a payment almost identical in nature. *Boston Fish Market Corp.*, 57 T.C. 884 (March 29, 1972) . . . The government . . . seeks to explain the disparate results on the ground that the taxpayer's contention in *Boston Fish Market* was that the lessee's payment was not income at all . . . and, once that point was decided against the taxpayer, the Commissioner abandoned his challenge to the propriety of capital gains treatment, see 57 T.C. at 887 n. 2."

The reference to the Tax Court opinion in *Boston Fish Market* is the following: "On brief the Commissioner no longer argues that the $47,500 is taxable in full as ordinary income." 57 T.C. at 887 n. 2.

test of surtax exemptions for Tidewater by entering into and filing a joint stipulation of dismissal of its appeal[2] from the unfavorable decision of the district court but continued to contest Bay Sound's right to the exemptions on its appeal. *Sirbo Holdings* was reversed because of the apparent similarity between its facts and *Boston Fish Market* and thus the government's apparent inconsistency in the two cases. *Bay Sound* must be reversed because of its admitted indistinguishability from *Tidewater* and thus the government's undeniable inconsistency in the two cases.

At two points in its memorandum, the government contends that discrimination against Bay Sound and in favor of Tidewater is negatived by the fact that the government initially contested the right of the taxpayer to the exemption in each case. (Mem. 4 and 5). *Sirbo Holdings* shows that initial equality of treatment does not pardon subsequent discrimination by abandonment of the contest in one case and contrary persistence in the other. Such initial equality of treatment obviously cannot excuse the government's subsequent discrimination

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2. The order dismissing the appeal in *Tidewater* reads as follows:

"The parties hereto having filed a joint stipulation of dismissal of appeal, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, effective July 1, 1968, and it appearing that the record has not been docketed in the United States Court of Appeals for the Fifth Circuit;

"IT IS ORDERED that the appeal taken by the defendant is hereby dismissed.

"Dated at New Orleans, Louisiana, this 2nd day of October, 1968.

"/s/ FRED J. CASSIBRY

United States District Judge"

against Bay Sound in view of its admissions in *Tidewater*. This is a clear-cut case of overt discrimination. As such, it is an ideal vehicle for this Honorable Court to affirm the government's duty to treat identically situated taxpayers equally, a duty recognized by two of the Circuits but ignored by the Fifth Circuit in this case.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief have been served on the United States by air mailing, with postage prepaid, on this the _____ day of _____, 1974, the same to the following:

(1) Robert H. Bork, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

(2) Meyer Rothwacks, Esquire
Chief, Appellate Section
Tax Division
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_____

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